Last page of docket
SHOW PROCEEDINGS AND ORDERS DATE: [05/17/88]

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SHORT TITLE: [Kern Tulare Water District]
VERSUS [Bakersfield, California] DATE DOCKETED: [02/5/88]
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In The
Supreme Court of the United States
October Term, 1987

KERN TULARE WATER DISTRICT,
Petitioner,

v.

CITY OF BAKERSFIELD, CALIFORNIA,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

Whether the State contemplated a City's anticompetitive acts when the acts 1) contravene state policies; 2) fail to promote a municipal function; 3) are proprietary arising out of private contract.

Whether the non-public service, proprietary acts of a City should be afforded *Parker* immunity, when identical acts by a Foreign Sovereign would not be afforded immunity.

Whether a State policy to displace competition in a municipal public service market, immunizes a City's attempt to monopolize a rural proprietary market.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
TABLE OF CONTENTS	ii
REFERENCES TO OPINIONS	1
JURISDICTION	1
CONSTITUTIONAL PROVISIONS AND RULES INVOLVED	2
STATEMENT OF THE CASE	2
REASONS FOR GRANTING THE WRIT	
I. THE DECISIONS OF THE CIRCUITS ARE INCONSISTENT WITH THE PRINCIPLES AND RATIONALE OF *PARKER* AND *TOWN OF HALLIE*, AND THE DECISION BELOW RAISES FUNDAMENTAL QUESTIONS RESPECTING A CITY'S IMMUNITY FOR ACTS WHICH CONTRAVENE STATE POLICY.	9
II. THE CIRCUIT DECISION CREATES THE ABSURD ANOMALY WHEREBY 85,000 NON SOVEREIGN CITIES ARE IMMUNIZED FOR PROPRIETARY ACTS, WHILE SOVEREIGN COUNTRIES AND SOVEREIGN STATES ARE NOT IMMUNIZED FOR PROPRIETARY ACTS.	16
CONCLUSION	22

APPENDICES:

Appendix A: Opinion of the District Court	App. 1
Appendix B: Opinion of the Court of Appeals	App. 30
Appendix C: Order of the Court of Appeals Denying Rehearing	App. 48

TABLE OF CONTINUED

	Page
Appendix D: State Statutes & Federal Statutes Involved	App. 49
Appendix E: Complaint	App. 55
Appendix F: Affidavits & Exhibits	App. 68

TABLE OF AUTHORITIES

Page

CASES:

Baldwin Park County Water District v. County of L.A., 25 Cal Rptr 167, 208 Cal. App. 2d 87 (1967) 11

California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc., 445 U.S. 97, 100 S. Ct. 937, 63 L Ed 2d 233 (1980) 19

City of Lafayette v. La. Power and Light Co., 435 U.S. 389 (1978) 10, 14, 15, 16, 17, 18, 20, 21

City of Santa Clara v. Von Raesfeld, 90 Cal Rptr 8, 474 P. 2d 976 (1970) 12

Community Communications v. Boulder, 455 U.S. 40 (1982) 10, 14

Elmore v. Imperial IRR District, 205 Cal Rptr 433, 159 Cal. App. 3d 185 (1984) 12

Jefferson City Pharmaceutical Assoc. v. Abbott Labs., 460 U.S. 149 (1983) 17

Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L Ed 2d 359, 93 S. Ct. 1022 21

Parker v. Brown, 317 U.S. 341 (1943) 2, 9, 15, 17, 18

Town of Hallie v. City of Eau Claire, 475 U.S. 34 (1985) 2, 9, 10, 14, 15, 16, 21

Wall v. City of Athens, Georgia, 663 F.Supp. 747 (1987) 15

STATUTES:

28 USCS 1604 and 1605 ..... 2, 16

California Water Code:

Section 100 ..... 2, 6, 12

TABLE OF AUTHORITIES—Continued

Page

Section 106.5 ..... 2, 6, 7, 12, 13, 20

Section 109 ..... 2, 11

Section 382 ..... 2, 11

Section 475 ..... 2, 11

Section 1203 2

Section 1461 2

Section 22259 ..... 2, 11

California Civil Code:

Section 711 ..... 2, 11

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioner Kern Tulare Water District respectfully petitions this court to issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

REFERENCES TO OPINIONS

The opinion and judgment of the United States District Court for the Eastern District of California are reproduced in the Appendix (App.) at pages 1 to 29, and the opinion is reported at 634 F. Supp. 656 (1986). The opinion of the United States Court of Appeals for the Ninth Circuit is reported at 828 F.2d 514 (1987) and appears at pages 30 to 47 of the appendix. The Circuit Court unpublished order denying rehearing appears at Appendix page 48.

JURISDICTION

The judgment of the Court of Appeals was entered on September 18, 1987, and rehearing was denied on November 17, 1987. This court has jurisdiction under 28 U.S.C. sec. 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

The pertinent State Statutes and Policy Provisions at Issue are reproduced at pages 49 to 54 of the Appendix. They consist of California Water Code sections: 100, 104, 106, 106.5, 109, 382, 475, 1203, and 22259; California Civil Code section 711; and United States Code section 1604 and portions of section 1605.

———o———

STATEMENT OF THE CASE

Petitioner, Plaintiff, Kern Tulare Water District is a public agency of the State of California. Petitioner filed a complaint against respondent City seeking to hold respondent responsible for specific federal antitrust infractions. Respondent, defendant, the City of Bakersfield, moved for summary judgment asserting that its anticompetitive acts were immunized under *Parker v. Brown*, 317 U.S. 341 (1943).

On the basis of the record and argument, (and without permitting discovery), the trial judge ruled that the specified anticompetitive acts were not immunized because they directly contravened express state policy and accordingly could not have been contemplated by the State of California. The Ninth Circuit reversed the trial judge's ruling and immunized the respondent's anticompetitive acts on the grounds that not every anticompetitive act needs to be articulated under *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); that petitioner's acts were foreseeably within the state's grant of authority to cities.

Petitioner's complaint (App. 55 to 67) which was supported by Exhibits and Affidavits, and which on respondent's motion must be deemed a factual statement not in dispute, essentially avers: that petitioner and respondent had been competitors in the marketing of surplus water to be used for irrigation on rural farmland; that in 1983, respondent acted to prevent petitioner from making any more sales in that competitive market; that petitioner's anticompetitive acts arose out of a private contract between the parties and were designed to, and intended to, allow respondent to monopolize the uncommitted water market in rural Kern County. In summary, Count I of the complaint averred that respondent was intentionally misconstruing and misapplying the contract between respondent and petitioner so as to create an agreement not to compete, an agreement not to permit sales and resales, an agreement requiring price approval amongst competitors, and an agreement restricting the alienability of property. The complaint also alleged that respondent's unreasonable refusal to consent to petitioner's resales constituted a violation of the Sherman Act and of State policy.

In summary, Count II charged respondent with an attempt to monopolize the rural uncommitted water market in the Kern County area, and set forth in detail, respondent's plans and anticompetitive actions directed toward that end. See App. 62 to 65.

The complaint and supporting exhibits established that respondent's water sales and marketing activities, and all anticompetitive acts: were extraterritorial, (that is were rural and not within the city's boundaries), were

proprietary[1] and not in furtherance of a municipal function.

As established in the record, respondent became the principal participant in the rural water business in 1976 when it purchased Tenneco Corporation's pre 1913 water rights and water facilities, all of which had previously been used by Tenneco for proprietary purposes. Respondent financed the purchase through the sale of bonds. The bonds were to be paid off with funds derived from the sale of the water to rural irrigation users.

In 1976, the respondent entered into water sales agreements by executing a number of 35 year contracts whereunder it sold the water at a fixed price to Water Districts such as petitioner. Under the terms of the 1976 contract between petitioner and respondent, the city sold and promised to deliver 20,000 acre feet of water each year for 35 years. In return, petitioner promised to pay $100,000.00 quarterly, for the 35-year duration. *The contract specified that the water was surplus to any anticipated needs of the city.* The contract was drafted by the respondent. All parties were aware of the obvious fact that the purchased water could not be channeled to, nor ever reach, the territory and farms lying within petitioner's district.

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[1]In a separate order dated March 26, 1985, the trial judge ruled that the Local Government Antitrust Act (LGAA) should not be applied retroactively to city's anticompetitive activity. In the order the trial judge found:

"In the instant case defendant engaged in a proprietary, as opposed to governmental, function when it contracted to sell the water of the Kern River to Plaintiff . . ., The water was and is being sold to several water districts for agricultural use beyond defendant's city limits. The price obtained for the water is regulated only by forces of the marketplace." (Page 5 of Order)

All parties contemplated that petitioner would have to either resell the water, or transfer it to others in exchange for the other's water which might be more accessible to petitioner's territory.

From 1977 through 1982, petitioner resold most of the water contracted for, and respondent delivered it to the resale buyer without objection. In these years, respondent was also selling additional surplus water to these same buyers. Accordingly, respondent and petitioner were wholesale competitors in the surplus water market of rural Kern County.

In 1983, petitioner sold 8,500 acre feet of its 1983 contract entitlement to each of two public water districts, for irrigation use by such districts, which lie in rural Kern County. Respondent refused to permit these two resales and refused to transfer the water to the buyers. The respondent asserted that they were interpreting the 35-year contract in such fashion as to prohibit resales (without the consent of the respondent), and that they would not consent to any more resales. The record establishes that respondent's *asserted* reason for the refusal to consent was that respondent wanted petitioner to *use* the water, rather than resell it. (App. 74-75) The record also revealed that the *true* reason for respondent's refusal was that respondent wanted petitioner to relinquish its rights under the 35-year contract because respondent had a contract to sell the water to Tenneco at a new price to be set by respondent. (App. 68-73, and 64) All of respondent's acts, to include its refusal to consent to, or deliver for, resales, were directed to pressure petitioner out of the market so that respondent could acquire power over price

and supply. As a consequence of respondent's acts, the resales could not be performed, and were aborted, and the water was never delivered or used, and it was forever lost to all users in the Kern water basin.

The record further establishes that the 17,000 acre feet would have been utilized efficiently for irrigation purposes but for respondents anticompetitive acts. The record is silent as to what ulimately happened to the water, except that respondent admitted, and the Trial Court found, that 1983 was a flood year and that petitioner's 17,000 acre feet of aborted resale water went down the river and was lost. The Circuit Court is in error when, on the basis of this record, it glibly surmises that maybe "the city has *avoided* waste consistent with section 106.5's prohibition . . ." (App. 43). This record establishes at a minimum, that there is a disputed fact as to whether the city's acts resulted in waste and less efficient use. At maximum, and in fact, the record establishes (even without discovery) that City's anticompetitive act's directly caused and resulted in the inefficient misuse and loss or presumed waste of water in volation of sections 106.5 and 100 of the State Water Code.

A minor imperfection appears in th Trial Court opinion at Appendix A. The court generally refers to contract provision 7.1 as the contract provision used by respondent to support respondent's assertion that consent to resell was required. The precise provision is provision 7.1c as found in the Appendix at App. 76. The first sentence of Clause 7.1c expressly grants petitioner the right to exchange water without consent. While the second sentence authorizes sales, respondent asserted that the second sentence didn't necessarily mean that resales could be without

consent (even though the instant sales were to the therein designated "other long term water contractors of the city.") Petitioner's position was and is that 7.1c refers to wholesale exchanges & sales while 7.1b refers to retail sales *for use* by those farmers who live in the Kern County portion of petitioners dual county district. Petitioner further asserted that the whole of provision 7 from (a) through (d) served no municipal purpose whatever and violated state law and policy as well as violating Sherman I, as an unreasonable provision restraining trade.

While a California City has authority to enter into contracts to sell its surplus water, there is nothing in the record which even suggests that a City has authority to restrict resales or territorial use of that water once it is sold. On the other hand, the record is filled with State Statutes which evidence that the State is opposed to such restrictions; opposed to precisely what City did in this case. (See Appendix D; App. 49 to 53.)

While the City has authority to *acquire water rights* before its inhabitants actually have a need for the water, (Section 106.5 at App. 50), that very authorization provision expressly mandates,

> "that no municipality shall acquire or hold any right to waste water, or to use water for other than municipal purposes, or to prevent the appropriation and application of water in excess of its reasonable and existing needs to useful purposes by others subject to the rights of the municipality to apply such water to municipal uses as and when necessity therefore exists."

Contrary to the suggestion contained in the circuit opinion, (App. 46-47), the respondent city neither needed

nor wanted the resale water for its own use. Indeed, the record revealed that the City didn't even supply water to its own residents. The Circuit Court's supposition is directly contrary to all evidence in the record. Even the letter outlining City's refusal to consent (App. 74 to 75) belies the Circuits supposition that—maybe the City needed the water. The record firmly establishes that the City had no foreseeable municipal use for any of the water which it had sold under 35 year contracts. When the City acted to prohibit petitioner's resales, the City rid itself of a competitor; it did not act to acquire water for its residents.

In this case we are concerned with a private contract involving proprietary non-sovereign activity, and with anti-competitive acts amounting to an attempt to monopolize a rural market. It just happens that the actor is a City; so the actor raised the issue of state action immunity. In the Ninth Circuit the City prevailed, even though city's activity does not constitute regulation or monopoly public service and even though there was no showing that the state has a policy to displace competition in the non-municipal rural irrigation market.

REASONS FOR GRANTING THE WRIT

I.

THE DECISIONS OF THE CIRCUITS ARE INCONSISTENT WITH THE PRINCIPLES AND RATIONALE OF PARKER AND TOWN OF HALLIE, AND THE DECISION BELOW RAISES FUNDAMENTAL QUESTIONS RESPECTING A CITY'S IMMUNITY FOR ACTS WHICH CONTRAVENE STATE POLICY.

The petition should be granted because the decision below is the culmination of a series of Circuit decisions which cite *Town of Hallie* as a rubber stamp to justify any and all anticompetitive acts of a City, whether the precise acts were, were not, or couldn't possibly have been, contemplated by the State. The Ninth Circuit does not attempt to confine *Town of Hallie* to those City acts which are reasonably directed toward furtherance of, or implementation of, state policy goals. The Circuit makes no attempt to, and establishes no test to, limit qualifying acts to those which reasonably might have been contemplated by the state. The Circuit simply qualifies any and all City acts, so long as the act is related to a subject over which the City has been granted some power (such as the subject—Water). In the decision below, the Court qualified or immunized City acts which directly contravened several state statutes and state policies;—immunized acts even though the acts were unrelated to a municipal purpose, and were unrelated to state policy goals.

In this circuit the Court interprets *Town of Hallie* to permit application of a toothless subject matter test which may be characterized as follows: If the state empowers a City to act on a subject matter, then any and all City anticompetitive acts, even peripherally relating to the subject

matter, *may* have been contemplated by the State and such acts are deemed to be pursuant to a policy of the state. As applied this test effectively destroys the principles of *Community Communications Co. v. Boulder*, 445 U.S. 40 (1982) and nullifies the principles of *Town of Hallie*, supra and *City of Lafayette v. Louisiana Power & Light Company*, 435 U.S. 389 (1978).

It should be noted that before applying its meaningless test to the case at bar, the Circuit initially ignored the factual record and thereafter made unsupportable suppositions of fact favorable to respondent moving party. Thereafter the court (while not setting out its reasoning) applied its subject matter test under the following constructed rationale—to wit: Because the City is authorized to acquire water *rights* in anticipation of the distant future water needs of its residents, the State as sovereign may have contemplated all anticompetitive acts which the City might engage in during the interim period between acquisition of rights and future municipal need for water; therefore the State may have contemplated that the City would dispose of the interim surplus water by private contracts; and the State may have contemplated that such contracts would contain anticompetitive provisions restricting resales, restricting voluntary re-transfers, restricting the most efficient manner and place of use, and imposing unreasonable and arbitrary consent requirements which as implemented resulted in inefficient use and waste of the water; Moreover the State may have contemplated that City would attempt to monopolize a County wide irrigation water market by destroying competition through contract misconstruction, contractual restraints of trade, refusals to deliver, and by the unreasonable prevention of competitive transfers and resales.

The Circuit arbitrarily infers that all present acts are contemplated by the state even though the present act doesn't further the State's policy of providing for future water needs of future City residents. Further the Circuit test trivializes or conveniently overlooks the following express state policies which were contravened by the very acts which the court so easily infers were contemplated. The Court refuses to address the proposition that: *THE STATE COULDN'T HAVE CONTEMPLATED RESPONDENTS ACTS BECAUSE:*

1. The State has an express policy against restraints on transfers of water. The State seeks voluntary and free transferability of water toward promoting the most efficient use of water (this is a pro-competitive policy). See Water Code Section 109, 475, and 382 (App. 51, 52). The State authorizes Water Districts such as petitioner to sell or resell surplus water. Water Code Section 22259(App. 52). The State has a strict policy against restraints on the alienation of property. Civil Code Section 711 (App. 53).

2. State policy and court decisions prevent cities and counties from interfering with, or regulating, Water Districts such as petitioner. See *Baldwin Park County Water District v. County of LA*, 25 Cal Rptr 167 at 163; 208 Cal App. 2d 87 (1962) wherein the Court stated:

> "In the present case, provisions of the Water Code indicate that the Legislature did not intend that irrigation or water districts should be subject to legislation by counties . . . Likewise, if a City or Cities within a district in a county were to enact legislation purporting to control the affairs of the district there would be confusion."

See also *City of Santa Clara v. Von Raesfeld*, 90 Cal. Rptr. 8, 474 P.2d 976 at 980 (1970) wherein the California Supreme Court indicated that it ceases to be a municipal affair and becomes a preempted statewide concern, whenever a City distributes water outside its borders for non resident purposes.

Under California law respondent was *precluded from enacting regulations* to accomplish its anticompetitive purposes vis-a-vis petitioner. Accordingly when respondent resorts to a contract gambit, (above described), to accomplish its purposes, respondent should not be rewarded with immunity, merely because it asserts that its acts were pursuant to state policy as contemplated by the state.

3. The respondent's acts contravened the most important state policy respecting water and water rights, namely that water must not be wasted, and must be put to the most beneficial and efficient use. Water Code Section 100 & 106 found at App. 49 codify the State Constitutional mandate which is noted in the footnote.[2]

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[2]To illustrate what waste encompasses even in time of a flood, and the importance afforded to avoiding waste, see *Elmore v. Imperial IRR. Dist.* 205 Cal. Rptr. 433 at 439, 159 Cal. App. 3d. 185 (1984) where the Court stated:

"IID has a clear mandatory duty to avoid wasting water, prevent flooding and provide drainage. Article X, sec 2 of the California Constitution requires "the water resources of the state be put to beneficial use to the fullest extent of which they are capable, and that waste or unreasonable use or unreasonable method of use of water be prevented. . . ." This same language . . . is also found in section 100 of the Water Code. . . . It was stated in *People of the State of California v. United States* (9th cir 1956) 235 F 2d 647, 663:

(Continued on following page)

On this record it must be concluded that respondent city's anticompetitive acts resulted in inefficient use or waste. The City refused to deliver the water to petitioner's resale buyers (for buyer's irrigation use); instead of delivering, city let the water escape in the river so it was lost to the Kern County basin; its ultimate disposition unknowable, but given that 1983 was a flood year it is reasonable to infer the water "flowed uselessly into the sea."

4. The very State Statute which authorizes a City to acquire *rights* to future water which the cities inhabitants may some day need, specifically prohibits the city from wasting or restricting the water during the interim period before it is needed for municipal purposes. Water Code Section 106.5 (App. 50). The record is clear that city had no need for the water which it refused to deliver to petitioners buyers. City's anticompetitive acts violated State policy and violated Section 106.5 and could hardly have been contemplated by the State.

In view of the above four state policies which are contravened by the anticompetitive acts of the City, one must ask how can one hold as a matter of law that the City carried its burden of showing that the state had contemplated or foreseen these flagrant contravening actions by the

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"(E)veryone must admit that the purpose of the Constitutional Amendment (now Art. X sec 2) was to vest with a public interest the use of all the waters of the state, so that no part of the precious supply should flow uselessly into the sea or otherwise go to waste. This characterization applies to flood waters as well as to normal flow."

City. Apply the Ninth Circuit subject matter test and you conveniently subvert or ignore the issue in effect leaping to the rationale that: The State has a fifth policy, namely that of insuring that city residents will have water in the distant future, and in endeavoring to effectuate that policy the State may have contemplated all anticompetitive acts and misuses or wastes which occur in the interim 35 year period before the City needs the water. The fatal error in the Circuit approach is that it fails to harmonize the different state policies; it fails to thread the needles by failing to ascertain that all policies could be fulfilled with respect to all water which is surplus to City's present domestic need.

The Ninth Circuit's uncabined, subject matter test effectively guts and makes meaningless the three most important immunity decisions decided by this High Court; namely *City of Boulder; City of Lafayette,* and *Town of Hallie.* To illustrate how the decision below is inconsistent with the meaning and principles of *Lafayette*, reflect upon the following analysis which is the analytical basis upon which all City immunity cases rest:

> When cities each of the same status under state law, are equally free to approach a policy decision in their own way, the anticompetitive restraints adopted as policy by any one of them, may express its own preference, rather than that of the state. Therefore, in the absence of evidence that the State authorized or directed a given municipality to act as it did, the actions of a particular city hardly can be found to be pursuant to "the state('s) command," or to be restraints that "the state . . . as sovereign" imposed. 317 U.S., at 352, 63 S.Ct. , at 314. The most that could be said is that state policy may be neutral. To permit municipalities to be shielded from the antitrust laws in such circumstances would impair the goals Congress sought to achieve by those laws, see supra, at 1131-1134, without furthering the policy underlying the Parker "exemption." Quote from *Lafayette* at 435 U.S. at 414 (1978).

In the case at bar the state *isn't merely neutral,* it's directly opposed to these acts.

By granting this Writ, this court can clarify and reassert the principles of those important decisions, and can thereby alert the non-sovereign cities that parochial proprietary interests are not going to be immunized through the mere unsupported assertion that the state might have contemplated the anticompetitive acts. The Circuit below quite arbitrarily inferred that a specific act was contemplated by the state under circumstances where it is clear that the State's expressed policy was contravened by the specific act. The subject matter test for inferring state contemplation effectively releases over 85,000 Cities, Counties, and Jr. public entities (to include petitioner water district), from federal antitrust constraints. The *Parker* line of cases was not designed to accomplish such an egregious result. The facts and record in this case offer the Court an ideal opportunity to give guidance to the Circuits, and to restore the meaning of *Parker* and *Town of Hallie.* Guidance and restoration are needed because post *Hallie* decisions and scholarly articles are erroneously concluding that *Hallie* should be read to immunize virtually all City acts. To further evaluate the scope of the issue, contrast the insightful reasoning of Judge Fitzpatrick in *Wall v. City of Athens, Georgia,* 663 F. Supp. 747 (1987) with the reasoning of the articles and circuit decisions therein cited and discussed.

II.

THE CIRCUIT DECISION CREATES THE ABSURD ANOMALY WHEREBY 85,000 NON SOVEREIGN CITIES ARE IMMUNIZED FOR PROPRIETARY ACTS, WHILE SOVEREIGN COUNTRIES AND SOVEREIGN STATES ARE NOT IMMUNIZED FOR PROPRIETARY ACTS.

The Writ should be granted in this case because the record below affords the court a timely and essential opportunity to determine whether a non-sovereign city should be accorded antitrust immunity for non-governmental (non-regulatory and non-public service) proprietary activities. Even foreign sovereigns aren't granted such immunity. (USCS sec. 1604 & 1605 at App. 53-54) Should cities which own businesses outside their borders be privileged over private businesses, and immunized over foreign sovereigns? *Town of Hallie* and *City of Lafayette*, supra, each cautioned that the parochial interests of the city may be contrary to the nation's, states', and peoples' interest. In this case the abused farmers and Petitioner Water District don't get to vote in City elections, and the City taxpayers profit from City's rural economic power. California's antitrust laws do not apply to cities. Only federal antitrust laws can restrain California cities in their business activities. In this country business abuses are serious infractions, and no one should be above the law, nor privileged in the marketplace:—not even foreign sovereigns!

While Congress may have intended to immunize the 50 sovereign states when they act in a governmental sovereign capacity, there is no evidence that Congress intended to immunize 85,000 non-sovereign governmental

bodies when they are not acting governmentally, but in effect are acting as socialized business entities. Cities are not sovereign and are not immunized; only certain acts of cities are immunized; proprietary acts arising under private contract should not be immunized. Governmental acts in furtherance of articulated state policy should be.

The record in this case clearly establishes that the city was acting in a proprietary capacity. See trial judge order dated March 26, 1985 which is quoted in footnote 1 supra.

Given that foreign sovereigns are not immunized for marketplace activities, and state agencies aren't immunized for Robinson-Patman activities, (*Jefferson City Pharmaceutical Assoc. v. Abbott Labs.*, 460 U.S. 149 1983) an anomaly is created by the ruling below which immunizes the marketplace activities of a mere non-sovereign city. The Writ should be granted so that our foreign friends and local businesses can be assured that no one is privileged in the American marketplace, least of all a city with parochial interests; a city which is not accountable to the rural farmers upon whom the city's abuses impact. Moreover, in this case the city acted as a party to a private contract, a fact which the *Parker* decision alluded to as being a major distinguishing significance. The following words of then Chief Justice Burger are most germane to this case and the historical analysis contained within his *Lafayette* concurring opinion is applicable now and in the future:

> "This case turns, or ought to, on the District Court's explicit conclusion, unchallenged here, that "(t)hese plaintiff cities are engaging in what is clearly a business activity; activity in which a profit is realized."

> There is nothing in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or its progeny, which suggests that a proprietary enterprise with the inherent capacity for economically disruptive anticompetitive effects should be exempt from the Sherman Act merely because it is organized under state law as a municipality." *City of Lafayette, supra*, 435 U.S. at 418.

In this case the city was not engaged in the governmental functions of either regulating or providing monopoly public service. Every prior *Parker* line Supreme Court decision repeatedly refers to and purports to limit itself to, city governmental activities which are "regulatory or monopoly public service." While petitioner argued this issue and submitted extensive briefs on this issue at both the trial and Circuit Courts, it was not addressed in the Circuit decision.

The issue is one of national and international importance. Foreign law professors and Secretaries of Commerce are certain to conclude that our Court inferred City immunity is not only illogical but unfair. While Congress proclaims that real foreign sovereigns are responsible for their proprietary acts, the judicial branch blindly immunizes the extraterritorial acts of thousands of non-sovereign cities and lesser bodies. The City's activities were purely proprietary and contractual in this case. They were the acts of a trader or seller; they were not regulatory enactments of a government, nor public service acts of a government. No public service was provided to inhabitants of the City or State. The City acted to increase its power over a free marketplace in rural surplus water.

Parker immunity is afforded to cities only when, pursuant to state policy, competition is displaced "with regulation or monopoly public service." The City's challenged activity is not the result of an exercise of its regulatory power. It has enacted no law. It is operating in the marketplace as Tenneco, its predecessor did. The City is not administering any state regulatory policy. Put simply, the City is in the business of marketing and selling surplus water to willing third party buyers, all of which occurs outside its boundaries. Therefore, the City's sales contracts, its market abuses, and its attempt to monopolize, do not qualify as a state authorized displacement of competition through *regulation or monopoly public service*. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, 445 U.S. 97 at 106, 100 S.Ct. 937, at 943, 63 L.Ed.2d 233 (1980).

An additional reason for granting the Writ should be noted. While the Circuit decision doesn't address the issue, an important legal issue is presented by the record, which issue was extensively briefed at both the trial and Circuit levels.

Respondent's motion for a summary judgment of immunity was granted on a record which contains absolutely no basis for establishing that the state had a policy for displacement of competition in the market to which Count II of the complaint refers. Respondent failed to show that the state intended to displace competition in the market that Respondent attempts to monopolize. Yet the Court below immunized respondent's attempt to monopolize that rural market. The rural irrigation market is *not related*

to the City municipal inhabitant market where competition is displaceable via monopoly public service.

The city sought to establish a policy to displace competition by referring to Water Code section 106.5. While that section is evidence that the state has a policy to protect cities in the *acquisition* of water rights to be used for existing and future municipal uses, it specifically prohibits the City from misusing water which may be surplus to such future municipal use. It mandates that the City not prevent others from access to such surplus water. That section does not grant the City *regulatory authority* over rural markets, nor over surplus water. Instead, the section *regulates* the City and prohibits the City from having monopoly discretion over its surplus water. Instead of evidencing a state intent to displace competition, this section evidences a state intent to promote transfers and insure efficient non-wasteful competitive uses.

The state policy with respect to the voluntary sales and transfers of surplus water and the most efficient use thereof is clear. There is no evidence that the state sought to displace competition with City public service, in the rural irrigation water market. Respondent's attempt to monopolize the rural irrigation water sales market cannot be immunized under *Lafayette* in the absence of a showing that the state had a clearly articulated policy to displace competition in this market with City monopoly public service. No such evidence can be found in the Statutes of California. Respondent relies on Statutes which merely establish that a City may be a lawful monopolist in providing its residents with domestic water. Respondent however ignores the law that "even a lawful monopolist

may be subject to antitrust restraints when it seeks to extend or exploit its monopoly in a manner not contemplated by its authorization." *City of Lafayette*, 435 U.S. at 417 citing as authority *Otter Tail Power Co. v. United States*, 410 U.S. 366, 35 L.Ed.2d 359, 93 S.Ct. 1022 (1973).

The uncertainty and disparate approaches taken by the lower federal courts on the issues presented by this case make this case worthy of review, as it would enable the Court to exercise its supervisory authority and provide much needed direction to the lower courts. The record in this case is supportive of Petitioner's arguments and positions, and upon review would almost certainly necessitate a reversal. Because cities are *no longer deterred* by the fear of antitrust damage suits (since enactment of the LGAA), it is critically important that some injunctive deterrence be maintained by putting teeth and meat in the test which is used to determine whether the City is acting pursuant to state policies as contemplated by the state. The Ninth Circuit test, which merely clears court dockets and frees the cities to do their parochial thing, must be corrected and modified. This record affords the court the ideal opportunity to solidify the law and prevent future misapplications of *Town of Hallie* and *City of Lafayette*.

———o———

CONCLUSION

For these reasons, the petition for writ of certiorari should be favorably considered.

Respectfully submitted,

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APPENDIX A

KERN-TULARE WATER DISTRICT, Plaintiff,

v.

The CITY OF BAKERSFIELD, Defendant.

No. CV-F-84-324 REC.

United States District Court, E.D. California.

March 31, 1986.

DECISION AND ORDERS

COYLE, District Judge.

I.

INTRODUCTION

Plaintiff's First Amended Complaint ("Complaint"), filed September 20, 1984, alleges Sherman Act violations, breach of contract, and unfair competition arising out of a contract to purchase water from defendant. This court has jurisdiction pursuant to 15 U.S.C. § 15, which creates federal jurisdiction for claims arising under the Sherman Act, and under pendent jurisdiction.

Defendant moves for summary judgment on the ground that it is immune from liability under the federal antitrust laws under the doctrine of state action immunity. In the alternative, defendant requests this court's abstention. Defendant also moves to dismiss the pendent claims. Defendant further moves the court to reconsider its order of March 26, 1985 regarding the applicability of the Local Government Anti-Trust Act of 1984, 15 U.S.C. section 34 *et seq.*, and to certify that order, as well as this order for interlocutory appeal in the event the court denies its mo-

tion for summary judgment. The court heard oral argument on these motions on December 16, 1985, following which the court placed the matters under submission. After a thorough review of the written and oral arguments of the parties, the court now enters its orders denying the motion for summary judgment, the motion for abstention, and the motion for reconsideration. The court will certify this order, as well as the order of March 26, 1985, however, for interlocutory appeal to the Ninth Circuit.

II.

FACTS

In 1976, defendant acquired all of Tenneco West Inc.'s Kern River water rights and related facilities in Kern County. Thereupon, defendant and plaintiff entered into a long-term contract ("contract"), which is exhibit one to the complaint. The contract has a term of thirty-five years, and in essence requires the plaintiff to pay the defendant $40,000 annually for 20,000 acre-feet of water per year.

In 1983 plaintiff desired to sell the bulk of its 1983 entitlement to other water districts. The City refused to permit the sale, invoking Clause 7.1 of the contract, which conditions and limits plaintiff's use of water purchased from defendant. *See* Agreement No. 76-61, Exhibit 1 to Complaint, page 28-29. As a result of defendant's refusal to consent, plaintiff claims it lost sales of the 1983 entitlement, thereby allegedly damaging plaintiff in the sum of $340,000.

Based upon these factual allegations, the complaint sets forth four different legal theories for relief in four

counts. Count One alleges that the City's refusal to consent is a violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 constituting a restraint of trade. In Count Two, plaintiff alleges that defendant violated section 2 of the Sherman Act, 15 U.S.C. § 2, by engaging in certain specified "monopolistic" activities in the market for uncommitted irrigation water in Kern County. Count Three is a pendent state law claim for breach of contract, and Count Four is a pendent claim for unfair competition under California Business and Professions Code § 17200.

III.

MOTION FOR SUMMARY JUDGMENT

Defendant's motion for summary judgment presents the court with one issue: Whether defendant, a municipality, is protected under the doctrine of "state action immunity" from liability under the federal antitrust laws.

A. *State Action Immunity Doctrine.*

The state action immunity doctrine, first articulated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), exempts a municipality from federal antitrust liability for its anti-competitive acts when the municipality acts pursuant to a state policy to displace competition with regulation. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413, 98 S.Ct. 1123, 1136, 55 L.Ed.2d 364 (1978). The policy must be clearly articulated and affirmatively expressed. *Community Communications Co., Inc. v. City of Boulder*, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). The Ninth Circuit has adopted a two-part test for assessing the availability of municipal state action immunity:

> **To prove that a policy is clearly articulated and affirmatively expressed, the City must demonstrate not only the existence of a state policy to displace competition with regulation, but also that the legislature contemplated the kind of actions alleged to be anti-competitive.**

Grason Electric Company v. Sacramento Municipal Utility District, 770 F.2d 833, 835-836 (9th Cir.1985); ***Preferred Communications, Inc. v. City of Los Angeles,*** 754 F.2d 1396, 1412 (9th Cir.1985); ***Lorrie's Travel and Tours, Inc. v. SFO Airporter, Inc.,*** 753 F.2d 790, 792 (9th Cir.1985); ***Tom Hudson & Associates, Inc. v. City of Chula Vista,*** 746 F.2d 1370, 1373 (9th Cir.1984), *cert denied,* — U.S. —, 105 S.Ct. 3503, 87 L.Ed.2d 634 (1985), *Accord Town of Hallie v. City of Eau Claire,* — U.S. —, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). The clearly articulated state policy need not compel the anticompetitive conduct, and the state policy may be inferred from the "broad authority to regulate." *Town of Hallie v. City of Eau Clairs,* — U.S. at —, 105 S.Ct. at 1718, 85 L.Ed.2d at 31. *See also Grason Electric Company v. Sacramento Utility District,* 770 F.2d at 836-837.

Thus, in determining whether defendant here is protected by the state action immunity, the enquiry is whether defendant's alleged anti-competitive conduct was pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation or monopoly in the provision of water resources, and whether the legislature contemplated the kind of actions alleged to be anti-

competitive.[1] *Town of Hallie v. City of Eau Claire,* — U.S. at —, 105 S.Ct. at 1718, 85 L.Ed.2d at 34.

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1. Both parties engage in a lengthy discussion about the applicability of *Garcia v. San Antonio Municipal Transit Authority,*—U.S. —, 105, S.Ct. 1005, 83 L.Ed.2d 1016 (1985) to this case. There, the Supreme Court held that the overtime and minimum wage requirements of the Fair Labor Standards Acts ("FLSA") applied to employees of a municipally-owned transportation system. The court reasoned that applying the FLSA to municipal employees contravened no affirmative limit on Congress' power under the commerce clause of the United States Constitution. In so holding, the court discarded the concept of "governmental" versus "proprietary" function as a criterion for characterizing actions of a local public agency for purposes of applying the FLSA.

   Plaintiff argues that because state action immunity is not based on constitutional interpretation, the *Garcia* case does not apply to it. "The 'proprietary/governmental' distinction remains viable when applying the antitrust laws to the cities." Plaintiff's response, page 15. Thus, plaintiff's argument goes, defendant's activities were "proprietary" rather than "governmental" and not subject to immunity from the antitrust laws.

   Defendant, on the other hand, contends that *Garcia* is applicable as reflecting the intent of Congress in enacting the Sherman Act under the Commerce Clause. See Defendant's Reply Brief, page 9. In other words, the Supreme Court in *Garcia* expressed a rationale as to when any legislation enacted under the Commerce Clause is constitutionally applicable to a municipality. Because Congress enacted the Sherman Act pursuant to its power to regulate interstate commerce, *Garcia* applies here, and eliminates any distinction between proprietary and governmental function regarding the state action immunity doctrine.

   The court believes that *Garcia* simply does not affect this case. The test for establishing state action immunity is thoroughly laid out in *Hallie* and the above-cited authority. None of the cases uses the governmental/proprietary distinction as a basis for decision. Chief Justice Burger in his concurring opinion in *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. at 417, 98 S.Ct. at 1138, 55 L.Ed.2d at 386-391, did utilize

(Continued on following page)

B. *State Policy.*

There is probably no subject which has been the source of more legislation, or litigation in California than the storage, use, and distribution of water resources. Plaintiff and defendant have divergent views as to what the state water policy is, and each points to specific statutory provisions supporting its view. In essence, defendant argues that the "elaborate web of state regulation, storage, sale and use of water" shows that "the state has substituted a controlled market for a free market in the acquisition, storage, sale and use of water." Defenrant's Reply Brief, pages 11 and 16. On the other hand, plaintiff contends that water legislation enunciates a policy encouraging beneficial use and free transfer of water rights; thus, defendant's acts "constitute an attempt to monopolize and destroy competition [and] are totally in contravention of what the state seeks to do pursuant to its enunciated policy." Plaintiff's Brief, page 33.

Although the court is unconvinced that the sheer bulk of state water regulation evidences a state policy to substitute monopoly for competition, the court agrees with defendant that municipalities are authorized to acquire

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(Continued from previous page)

this distinction in deciding that the city could not involve state action immunity. But neither the plurality opinion in that case nor the majority opinion in *Town of Hallie v. City of Eau-Claire* incorporated that reasoning.

Accordingly, whether defendant's conduct was proprietary or governmental is not the relevant consideration. Rather, whether state action immunity applies turns upon the analysis in the text.

water rights and contract to supply water. This authorization is found in the state constitution:

> A municipal corporation may establish, purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent.
>
> • • •

Cal. Const. Art. XI, § 9(a) (added June 2, 1970). Pursuant thereto, section 38742 of the California Government Code empowers a city to enter contracts for supplying its inhabitants with water.

> The legislative body of any city may (a) Contract for supplying the city with water for municipal purposes.
>
> (b) Acquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes in the city.

Cal.Govt.Code § 38742 (a) and (b) (West 1971). Section 38730 of the California Government Code further empowers a city to acquire by purchase or condemnation water, water rights, and related facilities "to supply water for the use of the city and its inhabitants." Cal.Govt.Code § 38730 (West 1971). The right of a municipality to acquire and hold water rights is also protected by section 106.5 of the California Water Code, which declares that "It is . . . the established policy of this state that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent

necessary for existing and future uses. . . ." Cal.Water Code § 106.5 (West 1971). *See also* Cal. Water Code § 1005 (Water Commission Act of 1914 does not deprive municipalities of right to appropriate water); Cal.Water Code § 1096 (Water Commission Act of 1914 does not affect municipalities' pre-1914 water appropriations).

These state statutes appear to represent at least as broad a grant of authority to regulate as those involved in *Grason Electric v. Sacramento Municipal Utility District*, 770 F.2d at 833. There, the Ninth Circuit found sufficiently clear articulation in a statutory scheme authorizing municipalities to provide utility services. The constitutional authorization for regulation, the court found, stemmed from the California Constitution, article XI, section 9, which also authorizes municipalities to purchase water rights and supply water to their inhabitants. California law clearly authorizes and envisions municipalities such as defendant to acquire water rights and supply water to its inhabitants. Thus, the court believes that California has enacted a statutory scheme that vests authority in municipalities to restrict competition in the provision of water. Other cases hold that similar statutory grants of authority to supply services express a clearly articulated policy to replace competition with monopoly. *See Preferred Communications, Inc. v. City of Los Angles*, 754 F.2d at 1396 (statute providing that cities "may" franchise cable television system articulated policy); *Lorrie's Travel & Tours, Inc. v. SFO Airporter, Inc.*, 753 F.2d at 790 (statute allowing city to regulate airport articulated policy to restrict competition in provision of ground transportation); *Springs Ambulance v. City of Rancho Mirage*, 745 F.2d 1270 (9th Cir.1984) (statute

allowing cities to contract for ambulance services articulates policy to displace competition); *Hybud Equipment Corp v. City of Akron, Ohio*, 742 F.2d 949 (6th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1866, 85 L.Ed2d 160 (1985) (statutory delegation to city to provide waste disposal services expresses policy.)

But this case is different than those cited, because in the area of water resources, California has an overriding policy that state water resources are to be utilized efficiently. Wells A. Hutchins summarizes this policy in his authoritative book, *The California Law of Water Rights*, at pages 11-12:

> The courts have consistently recognized the essential part played by the utilization of water in the economy of California. In the earliest days of statehood the policy of the State conferred the privilege of mining gold on the public lands and equally the privilege of diverting streams from their natural channels for beneficial purposes, not only for working the mines but for other purposes as well. With the passing of the years and the growth of other industries, it has become 'an obvious proposition that the development of the state's resources—its agricultural, horticultural, stock-raising, power, and other like industries—depends largely upon the fullest use of the water supply of the state'—not only the waters of non-navigable streams, but also those of navigable streams where the use for purposes other than navigation does not materially interfere with navigability.
>
> The policy inherent in the State water law is to utilize all water available; to encourage the impounding and distribution of storm and flood waters whenever it may be done without substantial damage to existing rights; and to require the greatest number of beneficial uses that the water supply can yield. The

limited quantity of water available necessitates careful economy in its use. Clearly the policy of the law is to require, within reasonable limits, the highest and greatest possible duty from the waters of the State in the interests of agriculture and other useful and beneficial purposes. The legislature has declared in the Water Code that the people have a paramount interest in the use of all the water of the State, and that the State shall determine what surface and ground water can be developed for the greatest public benefit, and in what way.

It is not the policy of the law to permit water to remain unused by a claimant of a water right while it can be beneficially used by others. 'The use of water in this state is of such great necessity as to preclude its being allowed to run to waste, * * *.' The State has a definite interest in seeing that none of the valuable waters of any of its streams shall go to waste.

(footnotes omitted) *See also C. Craig,* "California Water Law in Perspective," printed in West's Annotated Water Code, pages LXV-CVIII.

As stated by Mr. Hutchins, California water policy is articulated in Article 10, section 2 of the state constitution (adopted in 1982 as Article 14, section 3), which provides:

> It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or

> flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. . . . This section shall be self-executing, and the Legislature may also enact laws in the furtherance of the policy in this section contained.

Cal. Const. Art. X, § 2 (West 1971). This section has become the keystone of California water law, making the doctrine of reasonable use applicable to all water rights enjoyed or asserted in California. *See National Audubon Society v. Superior Court,* 33 Cal.3d 419, 443, 189 Cal.Rptr. 346, 658 P.2d 709 (1983). The California legislature had implemented these constitutional commandments through enactment of several provisions of the water code,[2] including section 106.5. That statute, while granting municipalities the right to acquire and hold water rights, also prohibits waste and unreasonable use,

> [N]o municipality shall acquire or hold any right to waste water, or to use water for other than municipal

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2. Section 100 of the California Water Code provides that the state's water resources be put to beneficial use "to the fullest extent of which they are capable" and that conservation is to be exercised "with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare." Cal.Water Code § 100 (West, 1971).

Section 102 of the California Water Code declares that "all water within the state is the property of the people of the state," but provides for the acquisition of rights to use water.

Section 104 of the California Water Code grants the state the right to determine what water of the state can be converted to public use.

> purposes, or to prevent the appropriation and application of water in excess of its reasonable and existing needs to useful purposes by others subjecting to the right of the municipality to apply such water to municipal uses as and when necessity therefor exists.

Cal.Water Code § 106.5 (West 1971).

Further, to effectuate efficiency, the legislature has expressly encouraged voluntary transfer and transfer of water rights:

> § 109. Efficient use of water, encouragement of voluntary transfer of water and water rights
>
> (a) The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights. It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import.
>
> *(b) The Legislature hereby directs the Department of Water Resources, the State Water Resources Control Board, and all other appropriate state agencies to encourage voluntary transfers of water and water rights, including, but not limited to, providing technical assistance to persons to identify and implement water conservation measures which will make additional water available for transfer.*

Cal.Water Code § 109 (West Supp.1985). Thus, while the legislature has granted municipalities the power to acquire water rights and distribute water to its inhabitants, that grant of power must be interpreted in light of the state's general water policy to avoid waste and encourage voluntary transfers. With this in mind, the court determines whether defendant is entitled to protection under the state action immunity doctrine.

C. *Application.*

Defendant's acts which are the gravamen of this suit clearly were done pursuant to one state policy. In accordance with legislative authorization found in section 38742 of the California Government Code, defendant adopted ordinances creating a water board and giving the Board certain powers and duties. *See* Defendant's Exhibit A. In order to provide water for its inhabitants, defendant filed an action for condemnation of Tenneco's Kern River water rights and facilities. When defendant ultimately agreed to purchase these water rights, it issued general obligation bonds to finance the acquisition.[3] *See* Declaration of Thomas M. Stetson, ¶¶ 3, 4. Defendant's contract to purchase the water rights owned by Tenneco West, and the contract to sell surplus water to plaintiff, were pursuant to its broad statutory authorization to provide water for the inhabitants of the City of Bakersfield, and accordingly were pursuant to a clearly articulated state policy.

But while it is clear that defendant's purchase and supply of water for the City of Bakersfield was done pur-

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3. Sections 43601-43602 of the California Government Code authorizes municipalities to incur indebtedness for water works and water rights subject to a two-thirds vote of the people. Additionally, section 38742(c) of the water code authorizes use of general obligation bonds to finance such acquisitions. Although authorization for public financing is not sufficient alone to express a "clearly articulated" state policy to displace competition, it is certainly evidence of such expression. *Cf. Hybud Equipment Corp. v. City of Akron, Ohio,* 742 F.2d at 962.

suant to one state policy, it is equally apparent that the allegedly anti-competitive acts giving rise to this lawsuit were directly contrary to the state policy favoring efficient use and free transferability of water resources. Defendant enforced a provision of the contract to prevent plaintiff from transferring its 1983 entitlement to an end user who presumably could make more efficient use of the water. These actions violate the spirit of California Water Code sections 106.5 and 109 if not the commands of the statutes themselves. Indeed, it is hard to square defendant's actions with state water policy especially when the water ultimately went into the state aqueduct and was lost to the Kern County water basin. *See* Exhibit B to Defendant's Joint Status Report. Defendant's restrictions on transfer and refusal to consent to plaintiff's sale of water therefore resulted in waste and inefficiency—a result not "reasonably designed to promote the state aims within a designated field of regulation."[4] *See Hybud Equipment*

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4. Defendant points to section 382 of the water code as authorization for its actions. That section provides:

> Notwithstanding any other provision of law, every local or regional public agency authorized by law to serve water to the inhabitants of the agency may sell, lease, exchange, or otherwise transfer water that is surplus to the needs of the agency's water uses for use outside of the agency. The authority granted to local and regional public agencies by this chapter shall not be construed as prohibiting or restricting the transfer of water or water rights pursuant to authority granted such agencies by provisions of law other than this chapter.

Cal.Water Code § 382 (West Supp.1985). But defendant's reliance is misplaced, for that section applies only to water rights held pursuant to an appropriation made *after* 1914. The water rights at issue here, however, are pre-1914 rights because they were acquired by the seller Tenneco West, Inc. and its subsidiaries prior to 1914. See Declaration of Stanley C. Hutch.

Corp. v. City of Akron, Ohio, 742 F.2d at 961. Defendant may have had the legal authority to engage in the challenged activity, but that is not enough to invoke state action immunity. In light of the overwhelming state policy favoring free transfer and efficient use of water resources, expressed in numerous and explicit statutes, the court cannot say that defendant's allegedly anti-competitive acts were contemplated by the state legislature. *See Hallie v. Eau Claire*, — U.S. at —, 105 S.Ct. at 1713, 85 L.Ed.2d at 24.

Defendant vigorously argues that state action immunity is not lost when the municipality's action violates state law, if done pursuant to state authorization. This argument is correct, but misconstrues the real issue in this motion. Professor Areeda explains that:

> If an allegation of agency error or other unauthorized action is enough to deny antitrust immunity for public agencies, virtually every zoning decision, franchise grant, utility tariff ruling, or other routine governmental act will be subject to antitrust scrutiny. . . . The antitrust court should require no more than that the result of the agency's act or decision was of the sort contemplated by the state anti-competitive policy. Ordinary errors or abuses in the administration of jurisdiction conferred by the state should be left for state tribunals to review.

P. Areeda, 1 ANTITRUST LAW, ¶ 212.5b at 57 (Supp. 1982). Here, there is no question that defendant was empowered to buy and sell water rights and supply its citizens with water. The issue here is not whether defendant, by engaging in the allegedly anti-competitive activity, violated the state law authorizing such activity, but whether the allegedly anti-competitive acts were contemplated by the

state legislature. The court is determining whether defendant is entitled to state action immunity, not whether it has lost immunity already conferred.

Indeed, the case cited by defendants as "the most significant case" on this contention supports the court's decision. In *Scott v. City of Sioux City, Iowa*, 736 F.2d 1207 (8th Cir.1984), *cert. denied*, — U.S. —, 105 S.Ct. 1864, 85 L.Ed.2d 158 (1985), plaintiff alleged that defendant city was not protected by state action immunity because, among other things, defendant violated state mandated procedures in passing the challenged ordinances. The Eighth Circuit concluded that

> [We do not] find the appellant's allegation that the city departed from the state mandated procedures in passing the challenged ordinances adequate grounds for stripping the city of immunity. The city's departure from state procedural requisites would have to be extreme to warrant the threat of antitrust liability. State authorization for antitrust purposes does not require administrative decisions that are free from ordinary errors.

736 F.2d at 1215-1216. But the court does not hold that defendant departed from state procedural requirements or otherwise violated the statutes authorizing defendant's activity. The court holds that defendant's acts contravened state water policy and therefore could not have been contemplated by the legislature. The other cases cited by defendant are also distinguishable in the same way. *See Golden State Transit v. City of Los Angeles*, 726 F.2d at 1430; *Campbell v. City of Phoenix*, 1983 Tr. Cases (CCH) ¶ 65,753 (D.Ariz.1984); *Llewellyn v. Carothers*, 1983 Tr. Cases (CCH) ¶ 65,358 (D.Ore.1983).

Because defendant is not protected by state action immunity, and in the absence of any material issues of fact, the court denies the motion for summary judgment. Fed. R.Civ.P. 56.

D. *Pendent State Claims.*

Defendant moves to dismiss the pendent state claims, plaintiff's third and fourth counts, arguing that because defendant is immune on the federal antitrust claims, the pendent claims should be dismissed as well. But denial of summary judgment renders this decision unnecessary.

IV

MOTION FOR ABSTENTION

In the event the court denies the motion for summary judgment, defendant seeks abstention in order to allow the matter to be determined in state court.

The Supreme Court in *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed.2d 483, *reh. denied*, 426 U.S. 912, 96 S.Ct. 2239, 48 L.Ed.2d 839 (1976), recognized three types of abstention used by federal courts:

> (1) Abstention is appropriate in case presenting a federal constitutional issue which might be mooted or presented in a different posture by a state court determination of pertinent state law. ("*Pullman*" abstention);
>
> (2) Abstention is appropriate where there have been presented difficult questions of state law bearing on the policy problems of substantial public import whose importance transcends the result in the case then at bar; ("*Burford*" abstention);

> (3) Abstention is appropriate where federal jurisdiction has been invoked for the purpose of restraining state criminal proceedings. ("*Younger*" abstention).

424 U.S. at 814-816, 96 S.Ct. at 1244-45, 47 L.Ed.2d at 496-97.

Defendant does not contend that the third type of abstention is applicable, but argues that (1) or (2) applies to this case.

This case is inappropriate for *Pullman* abstention because this case presents no unsettled questions of state law that may be dispositive of the case and avoid the need for decision on a federal constitutional question. *See* 17 C. Wright, A. Miller and E. Cooper, *supra*, § 4272 at 449. Indeed, this case really involves no federal constitutional question.

Burford type abstention is also inappropriate here. As explained by Justice Brennan:

> (b) Abstention is also appropriate where there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case then at bar.
>
> . . . . .
>
> In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern.

Colorado River Water Conservation District v. United States, 424 U.S. at 814-15, 96 S.Ct. at 1244-45, 47 L.Ed.2d

at 496-97. Undoubtedly, defendant is correct that "adjudication of water rights in arid western states is peculiarly one involving important issues of state law and goes to the heart of vital states policies." Defendant's Brief, page 39. But the present case is not an adjudication of water rights, rather, it is an antitrust claim arising out of federal law. Issues of state policy are relevant only to determining whether state action immunity should apply, and a decision on that question will have little or no impact upon implementation of state policy. Further, plaintiff's state law claims do not involve adjudication of water rights, but are based on settled principles of contract and unfair competition.

Neither would the exercise of federal review in this case be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. This case does not involve review of state administrative decisions, which is the situation in which this form of abstention was created, *see Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), or implementation of state water policy. California water law is germane here only to determine whether state action immunity applies.

Finally, defendants claim that abstention is proper in this case based on "considerations of wise judicial administration, giving regard to conservation of judicial resources and comprehensive disposition of litigation." *Colorado River Water Conservation District v. United States*, 424 U.S. at 817, 96 S.Ct. at 1246, 47 L.Ed.2d at 498.

In *Colorado River Water Conservation District v. United States*, 424 U.S. at 800, 96 S.Ct. at 1236, the federal

government brought suit in federal court in Colorado to adjudicate reserved water rights claimed on behalf of itself and certain Indian tribes. A stream of adjudication involving these same rights was pending in a state court. Because both actions would achieve the same end, the Supreme Court decided that it would be a waste of judicial resources to allow both actions to continue and therefore the district court should abstain.

Duplicity of litigation is not an issue here. A lawsuit to settle water rights in the Kern River, including defendant's, is pending in state court, but that case will have no effect on this litigation. The present case is not a stream adjudication. It is based on claims of breach of contract, unfair competition, and violations of the Sherman Antitrust Act. There will be no duplication of judicial effort if both actions are pursued; accordingly, the reasoning of *Colorado River Water* does not apply.

A court should rarely invoke abstention. In *Colorado River Water*, the Supreme Court stated:

> Abstention from the exercise of federal jurisdiction is the exception, not the rule. 'The doctrine of abstention, under which a District Court may decline to exercise or postpone the exercise of its jurisdiction is an extraordinary and narrow exception to the duty of a District Court to adjudicate a controversy property before it. Abdication of the obligation to decide cases can be justified under this doctrine only in the exceptional circumstances where the order to the parties to repair to the State court would clearly serve an important countervailing interest.' *County of Allegheny v. Frank Mashuda Co.* 360 US 185, 188-189, 3 L.Ed.2d 1163, 79 S Ct 1060 [1062-63] (1959).

424 U.S. at 813, 96 S.Ct. at 1244, 47 L.Ed.2d at 495-96. Defendant has shown no such exceptional circumstances here.

It would be unnecessary and wasteful to abstain from this case merely to allow a state court to determine California water policy, a subject which is unambiguous. The court therefore denies the motion to abstain.

V.

MOTION FOR RECONSIDERATION AND CERTIFICATION FOR INTERLOCUTORY APPEAL

A. *Motion for Reconsideration.*

In the event the court denies defendant's motion for summary judgment, defendant moves for a reconsideration of the court's order of March 26, 1985. In that order, the court ruled that the Local Government Antitrust Act ("LGAA"), 15 U.S.C. section 34 *et seq.* did not apply retroactively to defendant, thereby making it potentially liable for antitrust violations.

The order of denial of summary judgment is an interlocutory decree, *United States v. Florian*, 312 U.S. 656, 61 S.Ct. 713, 85 L.Ed. 1105 (1941), and accordingly the court in its discretion may reconsider such order. *See Major v. Benton*, 647 F.2d 110 (10th Cir. 1981); *Kirby v. P.R. Mallory & Co., Inc.*, 489 F.2d 904, 913 (7th Cir. 1973); *Middle Atlantic Utilities Co. v. S.M.W. Development Corp.*, 392 F.2d 380, 384 (2d Cir.1968). *See generally* C. Wright, A. Miller & E. Cooper, 18 FEDERAL PRACTICE AND PROCEDURE, § 4478 at 788-791 (1982). The Seventh Circuit has stated:

> If good reason is shown why a prior denial of a motion for summary judgment is no longer applicable or should be departed from, the trial court may, in the exercise of sound discretionary power, consider a renewed motion for summary judgment, particularly

when the renewed motion is based on an expanded record.

Kirby v. P.R. Mallory & Co., Inc., 489 F.2d at 913.

Courts have distilled various grounds for reconsideration of prior rulings into three major grounds for justifying reconsideration: (1) an intervening change in controlling law; (2) the availability of new evidence or an expanded factual record; and (3) need to correct a clear error or prevent manifest injustice. *See generally* C. Wright A. Miller & E. Cooper, *supra*, § 4478 at 790. *See also Major v. Benton*, 647 F.2d at 112. Defendant argues that the court should reconsider its order in light of *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. —, 105 S.Ct. 1005, 83 L.Ed.2d 1016 (1985), in which the Supreme Court eliminated the "proprietary" versus "governmental" distinction in determining whether the Commerce Clause empowered Congress to enforce the minimum wage and overtime provisions of the Fair Labor Standards Act against the States. "Since this distinction is critical to this Court's reasoning in its March 26, 1985 Order," defendant argues that ". . . the court, may wish to re-evaluate its decision."

A review of the order reveals, however, that the governmental/proprietary function distinction was not critical to the court's decision. In the order, the court does note that "In the instant case defendant engaged in a proprietary, as opposed to governmental, function when it contracted to sell the water of the Kern River to plaintiff"; Order, page 5; yet that distinction was not crucial to the court's decision. Rather, the court reasoned that any judgment would be satisfied by the City of Bakersfield Water

Facilities Corporation; and "it is not at all certain under the facts now before the court that this extensive, on-going commercial enterprise would be unable to satisfy a judgment from its own resources . . . ." Order, page 5. The capitalization of the City of Bakersfield Water Facilities Corporation, not whether the conduct engaged in was governmental or proprietary, was the determinative factor. Thus, *Garcia* has no bearing on the decision. Regardless of whether the court characterized defendant's actions as proprietary or governmental, the fact remains that the city and its taxpayers will not be burdened by the rendering of a money judgment against defendant in this case.

Defendant also argues that the court should reconsider its order in light of *Woolen v. Surtran Taxicabs*, 615 F.Supp. 344 (N.D.Texas 1985). In that case, plaintiffs were independent taxicab drivers contending that their exclusion from the Dallas/Fort Worth Regional Airport violated the Sherman Act. One of the questions considered by the Court was whether the plaintiff's claims for damages should be dismissed under the LGAA. The court held that the LGAA should apply, primarily because of the stage of litigation and the availability of alternative relief.

Woolen is an instructive exposition of the LGAA, and is certainly worth consideration. It does not, however, require reconsideration of the March 26, 1985 order. First and foremost, *Woolen* is not controlling authority in this district. Also, section 3(b) of the LGAA indicates that retroactivity will depend upon the circumstances of each case. In *Woolen*, the court determined that the age of the litigation, seven years, did not bar retroactivity because discovery was not completed before the effective date of the LGAA. This court determined that although the pend-

ing litigation was in its "infancy," that fact when weighed against the other factors was insufficient to tip the scales of equity in defendant's favor. This represents not a conflict in authority, or an improper decision, but differences in outcome based upon the circumstances of each case. Such results were clearly contemplated by the LGAA.

The court believes that the authority cited by defendant does not constitute an intervening change in controlling law requiring reconsideration of the order of March 26, 1985. Nor does the court believe that reconsideration is necessary to correct a "clear" error. Accordingly, the court will deny the motion for reconsideration.

B. *Motion for Interlocutory Appeal.*

Defendant also moves the court to amend this order, as well as the order of March 26, 1985, to allow for immediate interlocutory appeal to the Ninth Circuit pursuant to 28 U.S.C. section 1292(b). That statute provides:

> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

28 U.S.C. § 1292(b). Thus, under this section, a district court has discretion to certify an order for interlocutory appeal if all of the three following criteria are met:

> (1) The order involves a controlling question of law;
>
> (2) There is substantial grourds for difference of opinion; and
>
> (3) An immediate appeal from the order may materially advance the ultimate termination of the litigation.

In re Cement Antitrust Litigation (MDL No. 296), 673 F.2d 1020, 1026 (9th Cir.1982).

The court finds that with regard to the instant order, these criteria are met. An immediate appeal from the order might terminate the litigation because plaintiff does not seek injunctive relief. The summary judgment motion involves a single controlling question of law; that is, whether defendant is protected under the state action immunity doctrine. Although strong disagreement with a ruling does not mean that there is a "substantial ground" for difference of opinion, here, the application of state action immunity in the context of California's unique and Janus-headed water policy allows a difference of opinion for stronger than mere adversarial disagreement.

As to the order of March 26, 1985, both sides agree that an appeal from that order would materially advance the ultimate termination of the suit. They disagree, however, as to whether the order involves a controlling question of law for which there are substantial grounds for difference of opinion. Plaintiff argues that the order does not involve a question of law but is "based upon a fac-

tual determination which is left to the discretion of the judge." Plaintiffs Brief in Opposition to Motion for Reconsideration, page 12. But it seems that the order involves no questions of fact; rather, it presents only the legal question of whether under these facts and circumstances the LGAA retroactively applied to defendant. Reversal of the court's decision on appeal would terminate the lawsuit. Given the variety of factors bearing on this decision, the circumstances of this case, and the sparcity of authority interpreting the LGAA, it is the court's opinion that there are substantial grounds for difference of opinion.[5]

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5. The court also doubts whether the court's decision under the LGAA is to be reviewed under an abuse of discretion standard, as plaintiff contends. When the standard of review is abuse of discretion, interlocutory appeal may not be appropriate primarily because of a low probability of reversal. In any case, the court does not think the issue controlling inasmuch as the Ninth Circuit has rarely hesitated to accept interlocutory appeals for cases reviewable only for abuse of discretion or for application of impermissible legal criteria. *See, e.g., In re Coordinated Pretrial Proceedings, Etc.*, 691 F.2d 1335 (9th Cir.1982). The distinction between "discretionary" and "nondiscretionary" cases is certainly questionable, as stated by the Third Circuit with these apt words:

> The key consideration is not whether the order involves the exercise of discretion, but whether it truly implicates the policies favoring interlocutory appeal. The determination of what orders are properly reviewable under § 1292 (b) must be made by a practical application of those policies, not by a mechanical application of labels such as 'discretionary' or 'nondiscretionary.' Those policies, both before and since the enactment of § 1292(b) have included the avoidance of harm to a party pendente lite from a possibly erroneous interlocutory order and the avoidance of possibly wasted trial time and litigation expense. In this case, as subsequent discussion will disclose, there exists by virtue of the order appealed from both the possibility

(Continued on following page)

Defendant makes a strong argument for certification —if the retroactivity of the LGAA is not considered by the Court of Appeals at this time, defendant might never be able to appeal the issue adequately. The LGAA provides:

> [U]nless the defendant establishes and the Court determines, in light of all the circumstances, including the state of litigation and the availability of alternative relief under the Clayton Act, that it will be inequitable not to apply this subsection to a pending case. ***In consideration of this section, existence of a jury verdict, district court judgment, or any stage of litigation subsequent thereto, shall be deemed to be prima facie evidence that subsection (a) shall not apply.***

15 U.S.C. § 15(b) (emphasis added). Consequently, if this case goes to judgment, and plaintiff wins, defendant will face a heavier burden in showing that the LGAA is applicable retroactively. An appeal now, however, will allow defendant to present the issue squarely to the Ninth Circuit. In the court's opinion, this is an exceptional circumstance justifying interlocutory appeal. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475, 57 L.Ed.2d 351, 98 S.Ct. 2454 (1978).

The court concludes that in the exercise of its sound discretion, it will grant the motion to certify the orders for interlocutory appeal. The general purpose of section

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> of prejudice to a party pendente lite and the possibility of considerable avoidable wasted trial time and litigation expense.

Katz v. Carte Blanche Corporation, 496 F.2d 747, 756 (3d Cir. 1974).

1292(b), expressed in its legislative history, is to avoid protracted and expensive litigation:

> [Interlocutory appeal]should and will be used only in exceptional cases where a decision of the appeal may avoid protracted and expensive litigation, as in antitrust and similar protracted cases. . . . It is not thought that district judges would grant the certificate in order litigation which could otherwise be promptly disposed of or that mere question as to the correctness of the ruling would prompt the granting of the certificate.

Report, 1958 U.S.Code Cong. & Admin. News 5260-5261. *See also Parchall v. Kansas City Star Co.*, 605 F.2d 403, 406 (8th Cir.1979). The court's decision to allow interlocutory appeal in this potentially protracted and expensive antitrust action comports with this policy.

Accordingly, this order and the court's order dated March 26, 1985 shall be amended pursant to 28 U.S.C. section 1292(b) to allow interlocutory appeal of those orders to the Ninth Circuit Court of Appeals.

VI.

CONCLUSION

The court concludes that although defendant acted pursuant to a clearly articulated state policy to displace competition, the challenged acts contravened clearly expressed state policy regarding utilization of water resources and therefore were not contemplated by the legislature. Accordingly, defendant is not immune from federal antitrust liability under the state action immunity doctrine. This conclusion expresses no opinion on the underlying merits of the case, of course, but it does compel denial of defendant's motion for summary judgment.

Defendant's motion for summary judgment is therefore DENIED. The motions for abstention and reconsideration are also DENIED. The motion for certification for interlocutory appeal is GRANTED as set forth herein.

IT IS SO ORDERED.

APPENDIX B

KERN-TULARE WATER DISTRICT,

Plaintiff-Appellee,

v.

CITY OF BAKERSFIELD,

Defendant-Appellant.

No. 86-2324.

United States Court of Appeals,

Ninth Circuit.

Argued and Submitted July 17, 1987.

Decided Sept. 18, 1987.

Donald R. Prinz, Sacramento, Cal., for plaintiff-appellee.

Richard R. Terzian, Los Angeles, Cal., for defendant-appellant.

Appeal from the United States District Court for the Eastern District of California.

Before KOELSCH, SNEED and TANG, Circuit Judges.

TANG, Circuit Judge:

In this appeal we confront two issues. We decide first whether the involvement of California water law issues in an antitrust case warrants either dismissal for reasons of wise judicial administration or abstention. Because dismissal was not necessary for reason of wise judicial administration and since federal resolution of the antitrust claims does not unduly intrude upon state inteests,

we affirm the district court's refusal to dismiss or abstain. We also decide whether a city enjoys immunity from the antitrust laws for refusing consent to a water district which wished to sell certain water it had acquired from the city. Because we hold that the refusal to consent was a logical and foreseeable result of the city's statutory authorization regarding water rights, we reverse the district court's determination that the city was not entitled to immunity, and remand with instructions to dismiss the action.

I

The facts are undisputed and appear in the district court opinion at 634 F.Supp. 656-57. The City of Bakersfield (City) is located near the Kern River in Kern County, California. In 1976, it acquired certain Kern River water rights and related facilities. The City financed the acquisition by issuing municipal bonds, representing that future revenues from water contracts with utilities would serve to service the debt. Such a contract was entered into with the Kern-Tulare Water District (District). The contract provided for annual payments by the District to the City in the amount of $400,000 in return for 20,000 acre-feet of water per year. The contract provided further that, subject to certain exceptions, the District was prohibited from transfer of water received by the city under the contract without consent of the City.

The District attempted to sell the bulk of its 1983 entitlement to other districts. The City refused consent. The subject water was never used, however; the water eventually ran into the state aqueduct, and out of the Kern County water basin. The District filed an amended com-

plaint in the U.S. District Court for the Eastern District of California on September 20, 1984, which alleged that: (1) the City's refusal to consent to the transfer violated § 1 of the Sherman Act, 15 U.S.C. § 1; (2) the City was a monopolist in violation of § 2 of the Sherman Act, 15 U.S.C. § 2; (3) the City breached its contract; and (4) the City violated § 17200 of the California Business and Professions Code, which prohibits unfair competition. The District sought $340,000 in damages.

Pursuant to Fed.R.Civ.P. 56(d), the City moved on December 21, 1984, for a determination of a material issue relating to the retroactive application of the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (the LGAA). The City argued that the LGAA, which immunizes local governments from damages liability under the antitrust laws for acts undertaken in an official capacity, should be applied retroactively to it. The district court rejected this argument and denied the motion on March 26, 1985. Thereafter, the City moved for abstention or, in the alternative, summary judgment, and for reconsideration of the order denying retroactive application of the LGAA. The district court denied the motions in an opinion set forth at 634 F.Supp. 656 (E.D.Cal.1986). The district court certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b).

II

In denying the City's motion for abstention, the district court declined to abstain under the doctrine enunciated in *Burford v. Sun Oil Co.*, 319 U.S. 315, 63 S.Ct. 1098, 87 L.Ed. 1424 (1943), and declined to dismiss for reasons of "wise judicial administration" under *Colorado*

River Water Conservation District v. United States, 424 U.S. 800, 96 S.Ct. 1236, 47 L.Ed2d 483 (1976). We review its decision for an abuse of discretion. *See Turf Paradise v. Arizona Downs*, 670 F.2d 813, 819 (9th Cir. 1982) (citing *Pue v. Sillas*, 632 F.2d 74, 78 (9th Cir.1980)), *cert. denied*, 456 U.S. 1011, 102 S.Ct. 2308, 73 L.Ed2d 1308 (1982). We affirm the district court's refusal to abstain or dismiss.

A

Burford abstention is appropriate where

> . . . there have been presented difficult questions of state law bearing on policy problems of substantial public import whose importance transcends the result in the case at bar. [citation].... In some cases, however, the state question itself need not be determinative of state policy. It is enough that exercise of federal review of the question in a case and in similar cases would be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial policy concern.

Colorado River Water, 424 U.S. at 814, 96 S.Ct. at 1244. *See Burford*, 319 U.S. 315, 63 S.Ct. 1098. The purpose of *Burford* abstention is the avoidance of federal intrusion into matters which are largely of local concern and which are within the special competence of local courts. *International Brotherhood of Electrical Workers*, 614 F.2d 206, 212 n. 1 (9th Cir1980). In *Kaiser Steel Corp. v. W.S. Ranch Co.*, 391 U.S. 593, 594, 88 S.Ct. 1753, 1754, 20 L.Ed.2d 835 (1968), the Supreme Court held that whether a trespass relating to water rights could be a "public use" within the meaning of a state constitution constituted a "truly novel" issue of state law which warranted *Burford* abstention. The court noted that, "in the arid State of

New Mexico," the question presented was a crucial one of state law which should await state court adjudication. *Id.*

In *Colorado River Water*, while stating that *Burford* abstention was unavailable, the Supreme Court nonetheless upheld the district court's dismissal of the case. It did so in the interest of "wise judicial administration" in light of several factors which counseled in favor of unified state proceedings. Among these factors were concurrent state jurisdiction over the claims, and the McCarran Amendment, 43 U.S.C. § 666, which evinced a strong federal policy against piecemeal adjudication of water rights in a river system. 424 U.S. at 819, 96 S.Ct. at 1247.

B

In this case, the district court refused abstention on the grounds that: (1) a decision on the immunity question would have little or no impact upon implementation of state water policy; and (2) state water law was germane only as determinative of immunity, and thus the exercise of federal jurisdiction would not be disruptive of state efforts to establish a coherent policy with respect to a matter of substantial public concern. The court found no "exceptional circumstances" presented by state water policy, "a subject which is unambiguous." 634 F.Supp. at 664-65. We agree substantially with the district court's analysis.

It is possible to characterize this case as one which presents this difficult question of state law: whether a restriction on transfer of surplus water violates the policy in favor of voluntary transfer and against waste. As the district court noted, however, resolution of this question is important only insofar as it determines the federal

question of immunity, and not as it bears on policy problems so important that they transcend the result in this case. Every antitrust case which presents a question of *Parker* immunity necessarily involves construction or application of some state law. Although we choose not to characterize California water law as "unambiguous," we do not confront an unsettled question of state law such as in *Louisiana Power & Light v. Thibodaux*, 360 U.S. 25, 79 S.Ct. 1070, 3 L.Ed.2d 1058 (1959), or *Kaiser Steel*. *Kaiser Steel* concerned a question of state law which was "truly novel": whether a certain statute authorized condemnation of land to secure water for a private business in contravention of a state constitutional provision relating to taking. No such novel question appears here, although we nevertheless confront the "vital concern" of water rights in an "arid state." The question, as always in *Parker* immunity cases, is whether state law authorizes the challenged action. As in *Turf Paradise*, we are called upon to adjudicate federal antitrust claims and, in so doing, must referd to state law in order to resolve an immunity question.

Nor is federal determination of the immunity question disruptive of state efforts to establish coherent policy with respect to municipal control over water and water rights. No special considerations of federal-state relations exist here which would make the state law issue appropriate for deferral to the California courts. Concededly, we confront an area of comprehensive and complex regulation under state law. But the mere involvement of an area of state law which is the subject of detailed regulation does not make abstention appropriate. *See* 670 F.2d at 817. Our adjudication might possibly create conflict with

state law; but the mere potential for conflict, without more, does not warrant abstention either. *See Colorado River Water*, 424 U.S. at 815-16, 96 S.Ct. at 1245; *Turf Paradise*, 670 F.2d at 820. The question instead is whether such potential conflict would impermissibly impair California's efforts to establish policy regarding the regulation of water and water rights. We answer in the negative. We are called upon to adjudicate the District's federal antitrust claims. The only potential impact on the state arising from federal adjudication of those claims is the limitation of the District to the state courts if it wishes to pursue those claims which are not precluded by state action immunity. That result does not affect in the slightest California's ability to take acts necessary to regulate water and water rights, including measures aimed at precluding waste and unreasonable use. The district court thus correctly concluded that *Burford* abstention was inappropriate.

The District's reliance upon *Colorado River Water*, which prmits abstention on the grounds of "wise judicial administration," is similarly misplaced. *Colorado River Water* involved claims over which there existed concurrent state and federal jurisdiction. But here, as in *Turf Paradise*, the federal courts have exclusive jurisdiction over federal antitrust claims. *See* 670 F.2d at 821. Thus, the exercise of federal jurisdiction does not result in any waste of judicial resources. "Wise judicial administration" does not call for abstention in such circumstances. *See id. Colorado River Water* is further inapposite given the reliance upon the McCarran Amendment in that case and the absence of any similar federal legislation counseling in favor of unified state proceedings in this case.

Abstention is an extraordinary and narrow exception which is appropriate only where the consequences of exercising federal jurisdiction outweigh our obligation to adjudicate suits over which we have jurisdiction. *See Turf Paradise*, 607 F.2d at 819 (citing *Colorado River Water*, 424 U.S. at 813, 96 S.Ct. at 1244). The federal courts are obliged to exercise their jurisdiction in all but the most exceptional cases. This is not such an exceptional case. There was no abuse of discretion.

III

In denying the City's motion for summary judgment, the district court held that the City was not entitled to state action immunity from the antitrust laws under the doctrine enunciated in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). We review this decision de novo. *See State of Idaho v. Hodel*, 814 F.2d 1288, 1292 (9th Cir.1987) (citing *Ashton v Cory*, 780 F.2d 816, 818 (9th Cir.1986)). We reverse the district court's denial of summary judgment.

A

In *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Supreme Court held that no federal antitrust liability arises for an anti-competitive act by a state acting "as sovereign." Cities are not themselves sovereign. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 412, 98 S.Ct. 1123, 1136, 55 L.Ed.2d 364 (1978). Nevertheless, the state "as sovereign" may sanction anticompetitive municipal activities and thus shield its cities with *Parker* immunity for such activities. *Id.* at 413, 98 S.Ct. at 1137. Where a city claims *Parker* immunity, however, the court will require that the state

policy authorizing the challenged restraint be clearly articulated and affirmatively expressed. *See id.* at 410, 98 S.Ct. at 1135. *See also California Retail Liquor Dealers Ass'n. v Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980); *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978). A city need not point to a specific, detailed legislative authorization before it may properly assert a *Parker* defense to an antitrust suit. *See Springs Ambulance Service v. City of Rancho Mirage*, 745 F.2d 1270, 1273 (9th Cir.1984), (citing *Lafayette*, 435 U.S. at 415, 98 S.Ct. at 1138) (statute authorizing city to contract for ambulance services contemplated municipal provision of exclusive, free ambulance service). That is, not every anticompetitive effect of a statute need be articulated in order to satisfy the "clear articulation" requirement. *See Preferred Communications, Inc. v. City of Los Angeles*, 754 F.2d 1396, 1413-14 (9th Cir.1985). "No legislature can be expected to catalog all of the anticipated effects of a statute . . ." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43, 105 S.Ct. 1713, 1719, 85 L.Ed2d 24 (1985). So long as the restraint is a "foreseeable result" which results logically from a broad grant of regulatory authority to a city, the "clear articulation" requirement is satisfied. *Id.* at 42, 105 S.Ct. at 1718. We have upheld *Parker* immunity in various contexts. *See Mercy-Peninsula Ambulance, Inc. v. County of San Mateo*, 791 F.2d 755, 757-58 (9th Cir.1986); *Grason Electric Co. v. Sacramento Municipal Utility District*, 770 F.2d 833, 837-38 (9th Cir.1985), *cert. denied*, ——U.S.——, 106 S.Ct. 886, 88 L.Ed.2d 921 (1986); *Golden State Transit Corp. v City of Los Angeles*, 726 F.2d 1430, 1433-34 (9th Cir.1984), *Cert. denied*, 471 U.S. 1003, 105 S.Ct. 1865, 85

L.Ed.2d 159 (1985). *Compare Parks v. Watson*, 716 F.2d 646, 663-64 (9th Cir.1983).

B

In denying the City's motion for summary judgment, the district court held that the City was not immune because its action resulted in the loss of the water to the Kern County water basin, thus contravening the state policy favoring efficient use and free transfer of water. 634 F.Supp. at 662-63. In evaluating the district court's reasoning, a brief synopsis of the applicable California constitutional and statutory provisions is necessary.

We begin with the state constitution, which provides that water resources are to be put to beneficial use to the fullest extent of which they are capable, and that waste and unreasonable use are to be prevented. Cal. Const., Art. 10, § 2. *See also* Cal. Water Code § 100 (West 1971). The right to water and it use is limited to that which is reasonably required, and does not extend to waste or unreasonable use. Cal. Const., Art. 10 § 2. The use of all water is subject to the regulation and control of the state, in a manner to be prescribed by law. Cal. Const. Art. 10 § 5. The constitution declares further that municipal corporations may establish, purchase and operate public works to furnish their inhabitants with water. Cal. Const. Art 11. § 9(a).

We read these constitutional provisions to embody the principle that, within constraints imposed by law, municipalities are empowered to furnish themselves and their inhabitants with water, consistent with beneficial and reasonable use and the prohibition against waste. We

evaluate the relevant statutory provisions in light of this principle.

It is the "established policy" of California that a city's right to hold or use water "to the fullest extent necessary for existing and future uses" should be protected to the fullest extent necessary for existing and future uses, subject to reasonable use and the prohibition against waste. Cal. Water Code § 106.5 (West 1971). Cities enjoy the power to contract for supplying themselves with water for municipal purposes. Cal. Government Code § 38742 (West 1968). Cities are empowered to acquire water, water rights, and related facilities by purchase or by condemnation, in order to supply water for their use and the use of their inhabitants. Cal. Government Code § 38730 (West 1968). Section 382 provides that cities may sell, lease, exchange or transfer surplus water. It is also state policy to facilitate voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import, Cal. Water Code § 109 (West Supp.1987); the legislature has found that voluntary water transfers between users can result in more efficient use of water. Cal. Water Code § 475 (West Supp.1987). Cities are subject to the power of the Water Resources Control Board to take action necessary to prevent such unreasonable use or waste. Cal Water Code § 275 (West Supp.1987).

This constitutional and statutory framework evinces a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of municipal control over water and water rights, so long as the municipality does not engage in waste or unreasonable use. Viewed in light of that policy, we hold that

actions such as the City's refusal to consent to the District's attempted transfer were contemplated by the legislature. The restriction of transfer is foreseeable within the authority of the city to contract for, acquire and hold water rights, to furnish itself and its inhabitants with water, and to sell, lease, exchange, or transfer surplus water. *See Town of Hallie*, 471 U.S. at 42-43, 105 S.Ct. at 1718-19; *Mercy-Peninsula Ambulance*, 791 F.2d at 758; *Grason Electric Co.*, 770 F.2d at 838. The statutes summarized *supra* are at least as general as those held to contemplate similar anticompetitive conduct in *Town of Hallie*, 471 U.S. at 41, 105 S.Ct. at 1718, *Mercy-Peninsula Ambulance*, 791 F.2d at 757-58, *Grason Electric*, 770 F.2d at 837, and *Springs Ambulance Service*, 745 F.2d at 1273. Sufficiently clear articulation exists where the statutes clearly contemplate that a city *may* engage in anticompetitive conduct. *Grason Electric Co.*, 770 F.2d at 836 (quoting *Town of Hallie*, 471 U.S. at 43-44, 105 S.Ct. at 1719) (emphasis in original). Certainly, in empowering municipal corporations to: (1) contract for water for municipal purposes, Cal. Government Code § 38742(a); (2) purchase and operate public works in order to supply water to the cities and their inhabitants, Cal. Const. Art. 11, § 9(a), Cal. Government Code § 38730, and (3) sell, lease, exchange or otherwise transfer surplus water, Cal. Water Code § 382, the legislature contemplated that, in the exercise of those powers, cities might act by contract to preserve access to water for existing and future uses. *See Mercy-Peninsula Ambulance*, 791 F.2d 757-58 (statutory authorization for counties to contract for and regulate paramedic services had foreseeable anticompetitive effect); *Grason Electric Co.*, 770 F.2d at 837-38 (statutory authorization for utility to price below cost and "do all things necessary" to exercise its powers contemplated

anticompetitive conduct), *cert. denied*, —— U.S. ——, 106 S.Ct. 886, 88 L.Ed.2d 921 (1986); *Springs Ambulance Service*, 745 F.2d at 1273 (relying on Cal. Government Code § 38794 permitting city to "contract for ambulance service" in upholding immunity for provision of free, exclusive ambulance service); *Golden State Transit Corp.*, 726 F.2d at 1433-34 (city's refusal to renew taxicab franchise consistent with state policy to displace competition with regulation in taxicab industry), *cert. denied*, 471 U.S. 1003, 105 S.Ct. 1865 L.Ed.2d 159 (1985). Indeed, a city's ability to do so is explicitly protected "to the fullest extent necessary" so long as the city does not engage in waste or unreasonable use. Cal. Water Code § 106.5. It so occurred here. The City, anticipating future use for the water it sold to the District, acted to protect its right as guaranteed not only by its contract but as embodied in the policy stated in § 106.5. So long as it did not waste or unreasonably use that water, it acted consistent with the affirmatively expressed and clearly articulated state policy in favor of local control of water and water rights.

We reject the district court's reasoning that the City's refusal to consent resulted in waste or unreasonable use in contravention of state law.[1] *See* 634 F. Supp. at 662.

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1. The district court emphasized its reliance upon sections 106.5 and 109, which it construed to prohibit the city's transfer restriction. Section 106.5 provides:

> It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses, but that no municipality shall acquire or hold any right to waste water, or to use water for other than municipal purposes,

(Continued on following page)

The Supreme Court of California rejected a nearly identical argument in *City of Pasadena v. City of Alhambra*, 33 Cal.2d 908, 207 P.2d 17 (1949). In that case, the court examined the failure of a city to capture and return to an underground basin storm waters and street flush water. In rejecting the argument that such failure constituted waste, the court reasoned that simply because the subject water ran into storm drains and eventually out of the area did not mean that waste had occurred. *Id.* We confront highly similar facts here. 1983 was a "wet" year, and the water ran into the state aqueduct. Indeed, where the water is not used by the city but pumped into the aqueduct for use elsewhere, the city has *avoided* waste, consistent with § 106.5's prohibition of appropriation and application of water in excess of its reasonable and existing needs. *Compare Erickson v. Queen Valley Ranch*

(Continued from previous page)

> or to prevent the appropriation and application of water in excess of its reasonable and existing needs to useful purposes by others subject to the rights of the municipality to apply such water to municipal uses as and when necessity therefor exists.

Section 109 provides:

> (a) The Legislature hereby finds and declares that the growing water needs of the state require the use of water in * * * an efficient manner and that the efficient use of water requires * * * certainty in the definition of property rights to the use of water and * * * tranferability of such rights. It is hereby declared to be the established policy of this state to * * * facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import.
>
> (b) The Legislature hereby directs the Department of Water Resources, the State Water Resources Control Board, and all other appropriate state agencies to encourage voluntary transfers of water and water rights . . .

Co., 22 Cal. App.3d 578, 99 Cal.Rptr. 446 (1971) (diversion from creek by 2½ mile ditch over arid land, causing loss of 5/6 of flow en route, held unreasonable use): *Joslin v. Marin Municipal Water District*, 67 Cal.2d 132, 60 Cal. Rptr. 377, 429 P.2d 889 (1967) (en banc) (use of water as agent to expose, carry and deposit sand, gravel and rock held unreasonable): *Tulare Irrigation District v. Lindsay-Strathmore Irrigation District*, 3 Cal.2d 489, 567, 45 P.2d 972 (1935) (flooding for sole purpose of exterminating gophers and squirrels in area with great need of water held waste). We note further that California has empowered its Water Resources Control Board and other agencies to take various measures to guard against waste and unreasonable use. *See* Cal. Water Code §§ 275, 2525 *et seq*; *Elmore v Imperial Irrigation District*, 159 Cal. App.3d 185, 205 Cal.Rptr. 433 (1984): *Environmental Defense Fund, Inc. v East Bay Municipal Utility District*, 26 Cal.3d 183, 161 Cal.Rptr. 466, 605 P.2d 1 (1980). Such administrative machinery resembles the "customary and reasonable procedural safeguards" noted in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed2d 361 (1978). Those safeguards protect against the likelihood that a city will be able to waste or unreasonably use water before another potential user can avail itself of recourse.

Otherwise, we do not discern the "numerous and explicit statutes" relied upon by the district court, 634 F.Supp. at 662, which derogate from a municipality's right to preserve water for present and future uses so long as it does not engage in waste or unreasonable use. As to the district court's reliance upon § 109, that section states a policy of facilitation of voluntary transfer *where consistent* with the public welfare. The record is bare of any indication that the attempted transfer was consistent with the public welfare of either the place of attempted import or that of export—the City of Bakersfield.

Nor are we persuaded by the District's forceful reliance upon *Parks v. Watson*, 716 F.2d 646, 663-64 (9th Cir.1983), in support of the argument that the City exceeded its statutory authorization in refusing consent to the attempted transfer. *Parks* involved a city's refusal to vacate certain property which contained geothermal wells. The city conditioned vacating of its property on plaintiff's dedication to it of those portions of the land which contained the wells. Plaintiff, who planned construction of apartments which would be heated by the wells, alleged that the city combined to restrain trade in, and intended monopolization of, the city's geothermal heating market. The city argued that Or.Rev.Stat. §§ 523.010-.710 (1981), which authorized public ownership of geothermal resources, reflected legislative authorization for a "little monopoly" in each geothermal heating district. 716 F.2d at 663, 664. We questioned this contention, given the absence in the statute of an indication that the legislature intended such monopolistic control of the geothermal heating market by cities. *Id.* In rejecting immunity, however, we relied upon the city's contravention of the statute's requirement that a geothermal heating district not be formed by the city until its charter authorized it to do so. *Id.* at 664. The challenged conduct thus lacked the benefit of a clearly articulated and affirmatively expressed state policy to exclude competition in the geothermal heating market prior to the formation of geothermal heating districts. *Id.* Here we confront entirely

distinct statutory frameworks and facts. In this case the City has specifically implemented its delegated authority by adopting ordinances as part of its Municipal Code, creating a Water Board, and giving the Board certain powers and duties. Thus no contravention of explicit state law by way of proceeding even without municipal authority, such as occurred in *Parks*, confronts us here. Moreover, the Water and Government Code provisions discussed *supra* provide a clear indication that the legislature intended that municipal corporations exercise the power to contract for, acquire, own, and transfer water and water rights for the purpose of furnishing water to themselves and their inhabitants for both present and future uses. No similar indication existed in *Parks* that the legislature contemplated municipal monopolization of the geothermal heating market in enacting §§ 523.-610-.710. *Id.* at 663. No analogue exists, for example, to Cal. Water Code § 106.5, which protects "to the fullest extent necessary for existing and future uses" the right of a municipality to acquire and hold water rights.

Finally, even assuming the city may have contravened § 109's declaration of policy in favor of voluntary transfer, such contravention does not dispose of the immunity question. " 'Ordinary errors or abuses in the administration of powers conferred by the state should be left for state tribunals to control.' " P. Areeda & H. Hovenkamp, Antitrust Law ¶ 212.3b at 106 (Little, Brown & Co. Supp.1986). *See Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir.1985) (citing Areeda & Hovenkamp). Even though errors of fact, law or judgment by a public agency are not "authorized" within the meaning of *Parker*, the absence of immunity does not necessarily follow. Although the record sheds little light on this issue, it may be that the City erred

by overestimating its water needs, and on that basis refused consent to the District's attempted transfer. If such an error occurred, it became manifest when the water was pumped into the state aqueduct. But such an error does not necessarily strip the City of its immunity. State action immunity stems from the federalist notion of respect for the state's actions as sovereign. Where ordinary errors or abuses in exercise of state law, such as the California Water and Government Codes, serves to strip the city of state authorization, aggrieved parties should not forego customary state corrective processes, *see, e.g., Environmental Defense Fund*, 26 Cal.3d 183, 161 Cal.Rptr. 466, 605 P.2d 1, in favor of federal antitrust remedies. *See Llewellyn, supra;* Areeda & Hovenkamp, *supra* at 104-05.

IV

Reversal of the district court's denial of summary judgment on the basis of state action immunity makes unnecessary consideration of the issue of whether the LGAA should have been applied retroactively. We note, however, that the district court likely erred in refusing retroactive application of the LGAA given: (1) the inapplicability of the governmental/proprietary distinction, *see* Areeda & Hovenkamp at 94 n. 32; (2) its reliance on the erroneous factual premise that the Corporation and not the City would suffer liability; (3) the early stage of the litigation, *see Woolen v. Surtran Taxicabs, Inc.*, 615 F.Supp. 344, 351-52 (N.D.Tex.1985), *aff'd*, 801 F.2d 159 (5th Cir.1986), *cert. denied*, — U.S. —, 107 S.Ct. 1567, 94 L.Ed.2d 759 (1987).

AFFIRMED IN PART, REVERSED IN PART, AND REMANDED with instructions to dismiss the action on the basis of state action immunity.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KERN-TULARE WATER DISTRICT,	)	NO. 86-2324
	)	DC# CV-F-84-324-REC
Plaintiff-Appellee,	)	
vs.	)	ORDER DENYING PETITION FOR REHEARING AND SUGGESTION FOR REHEARING EN BANC
CITY OF BAKERSFIELD,	)	
Defendant-Appellant.	)	

(Filed November 17, 1987)

Before: KOELSCH, SNEED and TANG, Circuit Judges.

The panel as constituted above has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

WATER CODE OF THE STATE OF CALIFORNIA

§ 100. Fullest beneficial use of water resources

It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such water is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or watercourse in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water.

§ 104. State use and control of water

It is hereby declared that the people of the State have a paramount interest in the use of all the water of the State and that the State shall determine what water of the State, surface and underground, can be converted to public use or controlled for public protection.

§ 106. Use for domestic purposes and for irrigation

It is hereby declared to be the established policy of this State that the use of water for domestic purposes is the highest use of water and that the next highest use is for irrigation.

§ 106.5. Legislative policy as to municipal water rights

It is hereby declared to be the established policy of this State that the right of a municipality to acquire and hold rights to the use of water should be protected to the fullest extent necessary for existing and future uses, but that no municipality shall acquire or hold any right to waste water, or to use water for other than municipal purposes, or to prevent the appropriation and application of water in excess of its reasonable and existing needs to useful purposes by others subject to the rights of the municipality to apply such water to municipal uses as and when necessity therefor exists.

Added Stats 1945 ch 1344 § 1.

Note —Stats 1945 ch 1344 also provides: § 3. The purpose of this act is to effectuate the policy declared in Section 2 of this act and this act shall be liberally construed by the judicial and executive branches of the State Government to carry out its purpose.

"Section 2 of this act" added § 1203 to this code.

§ 1203. Excess water of municipality: Appropriation

Any water the right to the use of which is held by any municipality which is in excess of the existing municipal needs therefor may be appropriated by any person entitled to the posession of land upon which such excess water may be put to beneficial use but the right of such person to use such water shall continue only for such period as the water is not needed by the municipality. This section supplements but does not otherwise affect Sections 1460 to 1463, inclusive.

§ 1461. Appropriation for other than municipal purposes unauthorized

The application for, or the granting of, a permit to any municipality to appropriate water does not authorize the appropriation of any water for other than municipal purposes.

§ 109. Voluntary transfer of water and water rights

(a) The Legislature hereby finds and declares that the growing water needs of the state require the use of water in an efficient manner and that the efficient use of water requires certainty in the definition of property rights to the use of water and transferability of such rights. It is hereby declared to be the established policy of this state to facilitate the voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import.

(b) The Legislature hereby directs the Department of Water Resources, the State Water Resources Control Board, and all other appropriate state agencies to encourage voluntary transfers of water and water rights, including, but not limited to, providing technical assistance to persons to identify and implement water conservation measures which will make additional water available for transfer.

Declaration of Policy

§ 475. Legislative findings and declarations

The Legislature hereby finds and declares that voluntary water transfers between water users can result in a more efficient use of water, benefiting both the buyer and the seller.

The Legislature further finds and declares that transfers of surplus water on an intermittent basis can help alleviate water shortages, save capital outlay development costs, and conserve water and energy.

The Legislature further finds and declares that it is in the public interest to conserve all available water resources, and that this interest requires the coordinated assistance of state agencies for voluntary water transfers to allow more intensive use of developed water resources in a manner that fully protects the interests of other entities which have rights to, or rely on, the water covered by a proposed transfer.

Added Stats 1986 ch 970 § 1.

§ 382. Transfer of surplus water or water rights; authority of agency

Notwithstanding any other provision of law, every local or regional public agency authorized by law to serve water to the inhabitants of the agency may sell, lease, exchange, or otherwise transfer water that is surplus to the needs of the agency's water users for use outside of the agency. The authority granted to local and regional public agencies by this chapter shall not be construed as prohibiting or restricting the transfer of water or water rights pursuant to authority granted such agencies by provisions of law other than this chapter.

(Added by Stats.1982, c. 867, p. 3221, § 2.)

§ 22259. Lease, sale or use of surplus water

If its board deems it to be for the best interest of the district, a district may enter into a contract for the lease or

sale of any surplus water or use of surplus water not then necessary for use within the district, for use either within or without the district.

Added Stats 1943 ch 372 § 1.

CIVIL CODE OF THE STATE OF CALIFORNIA

§ 711. Conditions in restraint of alienation

CONDITIONS RESTRAINING ALIENATION VOID. Conditions restraining alienation, when repugnant to the interest created, are void. (Enacted 1872.)

UNITED STATES CODE

28 USCS § 1604

§ 1604. Immunity of a foreign state from jurisdiction

Subject to existing international agreements to which the United States is a party at the time of enactment of this Act [enacted Oct. 21, 1976] a foreign state shall be immune from the jurisdiction of the courts of the United States and of the States except as provided in sections 1605 to 1607 of this chapter [28 USCS §§ 1605-1607]. (Added Oct. 21, 1976, P. L. 94-583, § 4(a), 90 Stat. 2892.)

RESEARCH GUIDE

Am. Jur:

45 Am Jur 2d, International Law §§ 37-82.

§ 1605. General exceptions to the jurisdictional immunity of a foreign state

(a) A foreign state shall not be immune from the jurisdiction of courts of the United States or of the States in any case—

(1) in which the foreign state has waived its immunity either explicitly or by implication, notwithstanding any withdrawal of the waiver which the foreign state may purport to effect except in accordance with the terms of the waiver;

(2) in which the action is based upon a commercial activity carried on in the United States by the foreign state; or upon an act performed in the United States in connection with a commercial activity of the foreign state elsewhere; or upon an act outside the territory of the United States in connection with a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States;

(3) in which rights in property taken in violation of international law are in issue and that property or any property exchanged for such property is present in the United States in connection with a commercial activity carried on in the United States by the foreign state; or that property or any property exchanged for such property is owned or operated by an agency or instrumentality of the foreign state and that agency or instrumentality is engaged in a commercial activity in the United States;

(4) in which rights in property in the United States acquired by succession or gift or rights in immovable property situated in the United States are in issue; or

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APPENDIX E

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

* * *

KERN-TULARE WATER DISTRICT,	)	No. CV-F 84-324 REC
Plaintiff,	)	FIRST AMENDED COMPLAINT UNDER THE ANTITRUST LAWS AND PENDENT STATE CLAIMS (JURY DEMANDED)
vs.	)	
THE CITY OF BAKERSFIELD,	)	
Defendant.	)	

(Filed September 20, 1984)

Plaintiff, as and for its complaint against the Defendant complains as follows:

I.

PARTIES

1. Plaintiff, KERN-TULARE WATER DISTRICT, is a public agency existing and authorized under the laws of the State of California, and has its principal place of business in Kern County, California.

2. Defendant, CITY OF BAKERSFIELD, is a chartered city organized and existing under the constitution and laws of the State of California and situated in Kern County, California.

3. At all times pertinent to the actions herein alleged, Defendant City was engaged in a proprietary endeavor and was acting in a proprietary manner motivated by the quest for greater power over the uncommitted irrigation water market, and for a greater financial return from exploitation of that market. All of Defendant City's action pertinent to this complaint violated, thwarted, and interfered with that articulated and enacted public policy of the sovernign State of California as is expressed in the Water Code of the State of California and particularly in Sections 109, 380(d), 381-2, and 35425. By acting in such proprietary fashion, and by violating the policies and directives of the soverign State of California, Defendant City is answerable as any other person under the Federal Antitrust Laws and is not entitled to exemption therefrom. Defendant City did not act in conformity with, but rather directly contrary to, the articulated and affirmatively expressed state policy

of encouraging the free transferability of, and efficient competitive use of, water and water rights.

II.

JURISDICTION & VENUE

4. This complaint is filed and jurisdiction of the Court is invoked under 15USC ¶ 15. The purpose of this action is to recover damages against Defendants for injuring Plaintiff in its business of providing irrigation water to Kern County users which injury resulted from defendant's violations of the antitrust laws of the United States as hereinafter more specifically set forth. Count 1 arises under Section 1 of the Sherman Act (15 U.S.C. Sec. 1); Count 2 arises under Section 2 of the Sherman Act (15 U.S.C. Sec. 2); Counts 3 & 4 arise under the common and statutory laws of California for which the jurisdiction of this Court is invoked under the doctrine of pendent jurisdiction.

5. Venue is properly laid in this Court, in that the claims arose in this District, all the unlawful acts were executed within this District, and the Defendant is situated and may be found in this District.

III.

NATURE OF TRADE & COMMERCE

6. In 1976, Defendant City acquired from Tenneco West, Inc. and its wholly owned subsidiaries, ownership and control of irrigation canals, storage facilities, properties and water rights, (both riparian and appropriative) equipment for operation of the foregoing, and facilities for the marketing and transportation of irrigation water. Defendant City's control and operation of this integrated irri-

gation water supply, transportation, and marketing system directly affects, and has a substantive impact on the interstate and foreign commerce in each of the following product markets in the manner as set forth:

A) The users of Defendant's irrigation water are the farmers of Kern County, which county's farmers are third in the U.S. in the production of crops; millions of dollars of which are shipped in interstate and foreign commerce. To most of these farmers the cost of irrigation water constitutes the single largest expense of crop production. The cost of, and availability of, irrigation water constitutes the key and determative factor when farmer decisions are made respecting: the type of, and quantity of, crop to be grown and marketed in commerce; the type and quantity of fertilizer, seed, and insecticide to be purchased out of interstate commerce; the type and quantity of equipment to be purchased and moved in interstate commerce. Defendant's irrigation water business activities substantially affect commerce in these farm crops and crop inputs because farmers' decisions to grow or not to grow, to purchase or not to purchase, are dependent on the Defendant's pricing and supplying of irrigation water;

B) Defendant's storage, marketing, and transportation of its irrigation water substantially affects the interstate shipments of fuel and power, in that pumps and pumping stations are utilized in order to move and market the water, which pumps consume massive quantities of fuel and power which has moved or is moving in interstate commerce;

C) Defendant's marketing and pricing of irrigation water substantially affects the interstate and foreign movement of dollars, mortgages, and other financing in-

struments, in that interstate and foreign buyers of Kern County farmland are, and will be, deterred from, or, encouraged to, purchase or finance Kern County land, dependent upon Defendant's marketing practices in irrigation water;

D) Defendant's irrigation water activities are intrinsic to the flow of commerce, for it is the Defendant's water which is assimilated into the melon, grape, cotton and numerous other crops which are sold across the nation;

E) Were Plaintiff distroyed or financially weakened by reason of Defendant's activity as hereinafter alleged, Plaintiff's irrigation district would produce less for interstate commerce and would purchase less farm inputs out of interstate commerce, thereby substantially affecting interstate commerce in crops, fertilizers and equipment; and Plaintiff's water supply would be diverted to a corporate developer thereby affecting the interstate commerce in building materials and related products.

F) Defendant's water supply contracts which contain provisions unlawfully restraining trade, includes, encompass and cover at least 2,400,000 acre feet of water, which water could irrigate 1,500,000 acres of crops; crops which are dependent on irrigation for their existence. Defendant's other irrigation water sales, contracts and water marketing activity cover many additional acre feet and affect all aspects of economic development. As a primary Kern County supplier of uncommitted water, Defendant's water activities substantially affects interstate trade and commerce in farm products, farm supplies, farm financing, equipment, fuel, and farm sales.

IV.

COUNT I

(SHERMAN ACT SECTION 1 OFFENSE)

7. On or about May 28, 1976, Plaintiff and Defendant City entered into a 35 year contract prepared by Defendant. A true and exact copy of said agreement is attached hereto as *Exhibit "1"* and by this reference incorporated herein.

8. Per the terms of Exhibit "1", plaintiff was unconditionally obligated to make a $400,000.00 annual payment for 35 years, which annual payment was for the benefit and security of certain bondholders. In return, Plaintiff District was promised that: Defendant "City shall sell to District and District shall purchase from City a Basic Quantity of a cumulative average of Twenty thousand (20,000) acre feet per year of nonutility Kern River water during the basic term hereof". As known and contemplated by the parties, Plaintiff's irrigation district is situated such that none of the purchased 20,000 acre feet of water could be transported to, nor used upon Plaintiff District's farms.

9. On or about February 8, 1983, Plaintiff notified Defendant that Plaintiff had sold 8,500 acre feet of its 1983 Basic Quantity to the Cawelo Water District, and an additional 8,500 acre feet to North Kern Water Storage District, both of which buyers are public water districts serving Kern County farmers, and both of which agencies are entitled to water from Defendant pursuant to agreement contracts substantially identical to Exhibit "1".

10. On or about February 28, 1983, Defendant City advised all parties that Defendant would not permit the

aforesaid sales and transfers of Plaintiff's 17,000 acre feet of water. Defendant City also informed all parties that it would be in everyone's best interest if Plaintiff were to renegotiate its 35 year contract with Defendant, so as to allow the Defendant to retain and then itself sell any water which Plaintiff might otherwise have had available to sell.

11. In March and April, 1983, over the protests of Plaintiff seller and its buyers, City persisted in refusing to permit the sale or delivery of the 17,000 acre feet of water, thereby aborting the sales and causing Plaintiff to lose its 17,000 acre feet of water, damaging Plaintiff in the amount of the sales price of $340,000.00.

12. Defendant's refusal and activities resulting in the aborted sales were premised upon Defendant's interpretation of, and application of, Clause 7.1 of Exhibit "1", which contract construction and arbitrary application, separately and in combination, each constitute a contract and combination in restraint of trade. The contract as construed, and again as arbitrarily applied, constitute violations of Sherman Act Section 1, in that the interpretation and applicaton unreasonably:

A) Prohibits Plaintiff from competing with Defendant in the sale and transfer of uncommitted irrigation water to (1) other public water agencies and (2) to other end users. Plaintiff and Defendant were suppliers of irrigation water to both of these markets previous to Defendant's 1983 actions as herein alleged, which actions, founded on the contract, prohibited and prevented Plaintiff from continuing to be a competitor, and thereby constituted a per-se Sherman Act violation.

B) Constitute's a contract whereunder suppliers of irrigation water have agreed to allocate customers in such fashion that would be customer's seeking irrigation water are precluded from having any choice as to supplier or price, and are forced to deal with Defendant.

C) Restricts and unlawfully controls the alienability and transferability of Plaintiff's property rights, and unreasonably and unjustifiably destroyed Plaintiff's opportunity to make the most efficient and reasonable use of its property rights.

D) Achieves and results in a price fixing and effective price stabilization agreement by and between plaintiff and defendant, in that plaintiffs sales price and sales must be preapproved and agreed to by the defendant competitor of plaintiff.

13. In restricting Plaintiff by such contractual interpretation, and thereafter by arbitrarily and unreasonably refusing to consent to Plaintiffs sales, Defendant has directly caused Plaintiff to lose the sales and their proceeds and has foreclosed Plaintiff from doing business with other water districts and other consumers, and from competing with Defendant for customers, all to Plaintiff's damage in a sum of excess of $340,000.00.

V.

COUNT II

(SHERMAN ACT SECTION TWO)

14. Beginning in 1976 and continuing to and including the filing of this complaint, Defendant has planned to, and has attempted to, monopolize the market in the supply

and sale of uncommitted irrigation water in Kern County, in violation of Section 2 of the Sherman Act. (15 U.S.C. Sec. 2) Plaintiff incorporates by reference paragraphs 1 through 11.

15. Pursuant to and in furtherance of the aforesaid monopolization plan and attempt to monopolize, Defendant pursued a policy of preventing public water agencies from freely transferring that irrigation water which these agencies might not have a need or commitment for; by so preventing public agency uncommitted water from being transferred, Defendant City secured its position as being the only water supplier having uncommitted or surplus water which can be sold to landowners who have acreage which exceed the federal government's 160 acre limit.

16. In furtherance of said policy and plan Defendant City did unreasonably and without cause or justification arbitrarily withhold consent to Defendants requested transfer, and did impose abnormal barriers and irrelevant obstacles; all with the purpose and intent of forcing Plaintiff and others similarly situated to abandon their competitive marketing position and practices, and all for the further purpose of enhancing Defendant's monopoly power over the uncommitted irrigation water market of Kern County.

17. In further pursuit of its plan to monopolize, Defendant City advised Plaintiff it would withhold consent to any outside sale and simultaneously attempted to force Plaintiff to relinquish a portion of its water entitlement by urging plaintiff to renegotiate its 35 year water entitlement.

18. As part of its plan to control the market and market price of uncommitted irrigation water Defendant entered into a contract with a powerful corporate landowner and developer under the terms of which the landowner was afforded the right to acquire Plaintiff's water entitlement in the event that Plaintiff's contract was terminated; Under said contract Defendant retained the right to establish and set new prices for such water; said contract further gave the corporate landowner the express right to purchase water, (freed from all City approval requirements) from public agencies to include Plaintiff, but again this right was conditioned on, and subject to Defendant agreeing to the price which the landowner would pay to the Plaintiff or other public agency.

19. Defendant City's plan and the aforesaid acts in furtherance thereof were all done with full knowledge and understanding that the supply of uncommitted water is severly limited and that the demand therefore is ever increasing; that Plaintiff has the only uncommitted irrigation water in Kern County which would be competitive with Defendant's supply of uncommitted water; that by preventing Plaintiff from selling and competing, Defendant will achieve power and dominion over the market and will be the sole determinator of price.

20. Defendant City's plan and the aforesaid acts were all done with the intent and purpose of achieving control and power over, the supply of, and market in, uncommitted irrigation water in Kern County; that Defendant's acts and plan constitute a willful attempt to monopolize and control said market; that Defendant's actions directed toward preventing Plaintiff's sales were done with the intent and purpose of achieving control of the

market and did result in aborting Plaintiff's sales, to Plaintiff's injury in the amount of the agreed purchase price for such sales.

21. Defendant's act of withholding consent to Plaintiff's sales of 17,000 acre feet of irrigation water was without any justification whatsoever and was arbitrary and unreasonable and was done with the intent and purpose of acquiring monopoly power in a market which can easily be monopolized, and which has effectively been monopolized through this action of the Defendant, which action has caused Plaintiff to lose sales which would have netted Plaintiff $340,000.00, which amount Plaintiff has forever lost and incurred as injury.

VI.

COUNT III

BREACH OF CONTRACT

22. Plaintiff incorporates by reference paragraphs 1 through 5, 7 through 11, and 16.

23. Plaintiff willfully performed its obligations under the contract.

24. Defendant's construction and application of Clause 7.1 of the contract contravenes the public policy and water statute of California and constituted a breach of contract to Plaintiff damage in the sum of $340,000.00.

VII.

FOURTH COUNT: UNFAIR COMPETITION

25. Plaintiff incorporates by reference paragraphs 1 through 5, 7 through 20.

26. Defendant's conduct constitutes unfair competition in violation of Business and Professions Code Section 17200, et al. of the State of California.

WHEREFORE, the Plaintiff prays:

FIRST CLAIM

1. That the Court adjudge and decree that Defendant's acts constitute a violation of Section 1 of the Sherman Act and for damages in the sum of $340,000.00;

2. That such damage be trebled; and

3. For attorney's fees and costs herein incurred.

SECOND CLAIM

1. That the Court adjudge and decree that Defendant's acts constitute a violation of Section 2 of the Sherman Act and for damages in the sum of $340,000.00;

2. That such damage be trebled;

3. For attorney's fees and costs herein incurred.

THIRD CLAIM

1. That the Court adjudge and decree that Defendant's acts constitute a breach of contract for damages in the sum of $340,000.00;

2. For attorney's fees and costs herein incurred.

FOURTH CLAIM

1. That the Court adjudge and decree that Defendant's acts constitute a violation of Section 17200 of the California Business and Professions Code and for damages in the sum of $340,000.00.

2. That such damage be trebled; and

3. For attorney's fees and costs herein incurred.

Dated: September 11, 1984.

ANDERSON & ANTON

By: _____
THOMAS J. ANTON
Attorneys for Plaintiff

APPENDIX F

EXHIBIT IN TRIAL RECORD

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Attorneys for: Kern-Tulare Water District

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

• • •

KERN-TULARE WATER DISTRICT,	)No. CV-F 84-324)REC)
Plaintiff,	)AFFIDAVIT IN)OPPOSITION TO
vs.	)DEFENDANT'S)MOTION FOR
THE CITY OF	)SUMMARY)JUDGMENT
BAKERSFIELD,	)
Defendant.	)Date: Mar. 11, 1985)Time: 1:30 p.m.)Room: One

I, THOMAS E. ASHLOCK, being duly sworn, deposes and says:

1. I am manager of the Kern-Tulare Water District, the above named plaintiff, and I was the manager thereof during all times mentioned herein. I have personal knowledge of the matters herein referred to, and make this Affidavit in Opposition to Defendant's Motion for Partial Summary Judgment.

2. In 1976 the City of Bakersfield acquired from Tenneco West, Inc., and its subsidiaries, ownership and control of the properties and water rights, which are described on pages one and two of Exhibit 1 to the Complaint herein. Prior to the sale of these properties and water rights, the owner Tenneco West utilized them for private commercial purposes. Bakersfield, the new owner, has not materially changed the use or function of these properties and water rights. Bakersfield has not diverted the water from agricultural use to city residential use because it is in excess of their municipal needs. The waters are used only for agricultural purposes and are not used for industrial, municipal or domestic purposes within the City. Therefore, no argument can be made by the defendant that the water is used for City purposes. Therefore, the City acts not as a governmental agency but rather in a proprietary capacity.

3. Whenever the City sells surplus and uncommitted irrigation water, the price is determined by the City and the buyer on the basis of supply and demand. The price is not regulated by state regulators.

4. In 1983, Kern Tulare paid $400,000.00 to the City. Kern-Tulare was to receive 20,000 acre feet of water.

Kern-Tulare was unable to use all this water, so it agreed to sell 17,000 acre feet of its 1983 water. The City prevented Kern-Tulare from selling this 17,000 acre feet for $340,000.00. Kern-Tulare has lost, and has been damaged in the sum of $340,000.00 because of the actions of said City. The above referred damages are obviously a sizeable amount of money for a small water district to lose. The impact will be felt by the district and its members. If the $340,000.00 is recovered, the district members will be relieved of an assessment of approximately $13.00 per acre. Given the depressed farm economy locally, this is an unconscionable result.

5. Bakersfield funded the purchase of the Tenneco West properties and water rights without taxing Bakersfield taxpayers. Certain bondholders provided the funds. There is no evidence whatever to indicate that the Bakersfield irrigation water businesses is unprofitable. Bakersfield could recoup any judgment against it by selling additional water that naturally occurs in its supply. Bakersfield taxpayers will not, therefore, suffer an additional tax by entry of a judgment against the City in this case.

6. Bakersfield's activities are not consistent with the efficient use and competitive use of irrigation water in that they are parties to numerous contracts which give them the unilateral right to veto or refuse free market competitive efficient transfers of water. Bakersfield's use of these veto powers, as in this Kern-Tulare case, is quite consistent with acquiring market power over, and profits in, uncommitted irrigation water.

Dated: February 22, 1985.

/s/ Thomas E. Ashlock
THOMAS E. ASHLOCK

State of California)
) ss.
County of Kern)

On this 22nd day of February, 1985, before me, Debra J. Strang, the undersigned Notary Public, personally appeared THOMAS E. ASHLOCK, proved to me on the basis of satisfactory evidence to be the person whose name is subscribed to the within instrument, and acknowledged that he executed it.

WITNESS my hand and official seal.

/s/ Debra J. Strang
DEBRA J. STRANG

(SEAL)

EXHIBIT IN TRIAL RECORD

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Attorneys for Kern-Tulare Water District

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF CALIFORNIA

KERN-TULARE WATER DISTRICT,	) No. CV F 084-324
Plaintiff,	) DECLARATION OF THOMAS E. ASHLOCK IN OPPOSITION TO DEFENDANT'S MOTION FOR SUMMARY JUDGMENT
vs	
THE CITY OF BAKERSFIELD,	) DATE: November 18, 1985
Defendant.	) TIME: 1:30 p.m. ROOM: ONE

(Filed November 4, 1985)

The undersigned, Thomas E. Ashlock says:

1. I am, and was at all times mentioned herein, the manager of the Kern-Tulare Water District, hereinafter ("Kern-Tulare" or "the District") and have personal knowledge of the matters stated herein.

2. In 1977, Kern-Tulare entered into a long term agreement which has been marked as Exhibit "1" to the Complaint, pursuant to the terms of that agreement Kern-Tulare and I believed that the District could sell or exchange water with other irrigation districts pursuant to the terms of section 7.1.

3. On or about 1977, and at all times through 1983, Kern-Tulare had surplus water and Kern-Tulare did sell such water without objection from the City of Bakersfield.

4. In February, 1983, Kern-Tulare arranged to sell surplus water as alleged in the Complaint. The District

did send a letter dated February 8, 1983 to the City of Bakerfield which is attached hereto as Exhibit "A".

5. Shortly thereafter, the City refused to permit such sales and as a part of such refusal, sent its reply which is attached hereto as Exhibit "B".

6. Kern-Tulare was unable to use its 1983 excess water and did not receive it. Kern-Tulare received no credit or other compensation from the City for the water which was not delivered. Accordingly, it is reasonable to assume that the City is correct when it states in paragraph 18, Page 3, line 11 of Exhibit "B" to the Joint Status Report dated November 14, 1984 that the water "went down the river and was lost to the Kern County B in."

7. Kern-Tulare's sales of excess water were pursuant to Water Code Section 22259 and would have been beneficial to Kern-Tulare and to the water user.

8. The City has entered into an agreement with Tenneco-West to take over Kern-Tulare's water if Kern-Tulare's contract is terminated by the City. That agreement, Contract No. 77-71 dated May 2, 1977 is attached hereto as Exhibit "C".

I certify under penalty of perjury that the foregoing is true and correct.

Executed in Bakersfield, California on 11/1/85, 1985.

/s/ Thomas E. Ashlock
THOMAS E. ASHLOCK

EXHIBIT IN TRIAL RECORD

CITY OF

BAKERSFIELD CALIFORNIA

Department Of Water

February 28, 1983

Mr. T. E. Ashlock, Manager
Kern-Tulare Water District
Room 314, Great Western Savings Building
1415 - 18th Street
Bakersfield, CA 93301

RE: Transfer of Use of Contract Water

Dear Mr. Ashlock:

This is in reply to the request contained in your letter of February 8, 1983, to transfer the use of 17,000 acre-feet of your Basic Quantity water under Agreement No. 76-61 to Cawelo Water District and to North Kern Water Storage District during 1983. Although the City has agreed to such proposed transfers over the past six years, it is now becoming apparent that your district is not exercising diligence in developing the means of utilizing its water under Agreement No. 76-61. Further, to the extent this involves a rescheduling of your water deliveries, it is inconsistent with Section 6.1d of your contract, requiring such revisions prior to December 1 of the year preceding the year for which you desire to vary the schedule.

During the six years from 1977 through 1982 your district has used only about 18,350 acre-feet (or about 15 percent) of its Basic Quantity water within the district. The balance of about 106,650 acre-feet (or about 85 percent) was transferred for use elsewhere.

As you know, the City of Bakersfield accommodated your district in providing for the exchange of Kern River water

under the contract in order to avoid the necessity of constructing or acquiring conveyance facilities to transport the Kern River water to the district. However, the clear intent of the agreement is for your district to use its Basic Quantity water within the Kern County portion of your district--either by direct delivery or by exchange for Friant-Kern Canal water. We feel that allowing six years for your district to make such arrangements was ample time in which to accomplish this. Repetitious, short-term, annual sales for use outside your district, arranged at the last minute, are not consistent with the intent of the contract. For the foregoing reasons; as well as others, the City of Bakersfield will not approve of your request for transfer of such water use in 1983.

The inability to use the contracted for water and the failure to build facilities allowing such use within your district apparently creates a financial burden on the district. Perhaps it would be to everyone's best interest to renegotiate your contract to relieve your district of all or a portion of that burden. Representatives of the City would be willing to meet with representatives of your district in that regard if you so desire.

Very truly yours,

/s/ JAMES J. BARTON
Chairman of the Board

sr

cc: North Kern Water Storage District
Cawelo Water District
Stan Hatch
Tom Stetson
Richard Oberholzer

RELEVANT CONTRACT PROVISION FOUND IN TRIAL RECORD

ARTICLE VII

USE OF WATER

7.1 *Use of Water*

District shall utilize the water delivered hereunder subject to the following conditions:

a. The water shall be used only for irrigation, spreading, stock water and incidental agricultural purpose witain the boundaries of District.

b. District shall not sell said water for use other than within the existing Kern County portions of the boundaries of District without prior written notice to and approval of City, which approval shall not be unreasonably withheld.

c. Water sold by City and purchased by District hereunder may be freely exchanged with other such long-term firm water contractors of City or with Friant-Kern Canal contractors within Kern County, with Arvin-Edison Water Storage District, with Shafter-Wasco Irrigation District or with the Kern County Water Agency or an Improvement District thereof. District shall not sell such water to or exchange the same with any other person or entity without prior written approval of City. All said water or that exchanged therefor shall be used only on lands witnin Kern County and within the boundaries of District.

d. Notwithstanding any other provision of this Agreement, District shall not use or cause to be used, either directly or indirectly, the water which is the subject of this Agreement outside of the boundaries of the County of Kern.

87-1433

No. 88 --

Supreme Court, U.S.
FILED
MAR 30 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE SUPREME COURT

OF THE

UNITED STATES

October Term, 1987

KERN-TULARE WATER DISTRICT,

Petitioner,

vs.

CITY OF BAKERSFIELD, CALIFORNIA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION BY RESPONDENT CITY OF BAKERSFIELD, CALIFORNIA

Richard R. Terzian
Adams, Duque & Hazeltine
523 West Sixth Street
Los Angeles, California 90014
(213) 620-1240

Attorneys for Respondent
City of Bakersfield, California

QUESTION PRESENTED

The only question presented in this case is whether the California Constitution and statutes evidence a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the area of municipal control over water and water rights.

The "questions presented," as articulated by Petitioner are merely an attempt to draw into question matters which are totally irrelevant in order to avoid the state action issue which must be decided in favor of Respondent City of Bakersfield under all federal case law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED.	i
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED	1
STATEMENT OF THE CASE	2
REASONS FOR DENYING THE WRIT.	7
I. THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS COMPLETELY CONSISTENT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND WITH THE DECISIONS OF THIS COURT ON THE ISSUE OF STATE ACTION IMMUNITY FOR MUNICIPALITIES FROM DAMAGES LIABILITY UNDER FEDERAL ANTITRUST LAWS.	8
II. THE OTHER ISSUES RAISED BY DISTRICT ARE IRRELEVANT AND DO NOT PRESENT A BASIS FOR REVIEW BY THIS COURT	25
CONCLUSION.	29
APPENDIX A.	APP. 1
I. CALIFORNIA CONSTITUTION . .	APP. 1
II. CALIFORNIA GOVERNMENT CODE.	APP. 3
III. CALIFORNIA WATER CODE.	APP. 5

TABLE OF AUTHORITIES

CASES	Page(s)
Baldwin Park County Water District v. County of Los Angeles, 208 Cal.App.2d 87 (1962) . . .	22
City of Santa Clara v. Von Raesfeld, 3 Cal.3d 239 (1970)	23
Garcia v. City of San Antonio Municipal Transit Authority, 469 U.S. 528 (1985), reh. den. 471 U.S. 1049 (1985).	26
Hoover v. Ronwin, 466 U.S. 558 (1984), reh. den. 467 U.S. 1268 (1984) . .	18,19,20
Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), cert. den. 471 U.S. 1003 (1985)	20,21
Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985)	9,10,11,15,17,22,24,27

STATUTES	
Supreme Court Rules	
Rule 17	7
Rule 17.1(a)	9
California Water Code	
Section 275.	15

TREATISE	
Areeda, Antitrust Law, ¶ 212.3(b) at p. 57 (Supp. 1982)	21

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The provisions of the California Constitution and statutes which are relied on by Respondent City of Bakersfield and not contained in the Appendix to the Petition for Writ of Certiorari are set forth in full in Appendix A to this Brief.

STATEMENT OF THE CASE

The statement of the case set forth in the opinion of the Ninth Circuit Court of Appeals accurately describes the material facts in this case and the proceedings in the district court:

> "The [Respondent] City of Bakersfield (City) is located near the Kern River in Kern County, California. In 1976, it acquired certain Kern River water rights and related facilities. The City financed the acquisition by issuing municipal bonds, representing that future revenues from water contracts with utilities would serve to service the debt. Such a contract was entered into with

the [Petitioner] Kern-Tulare Water District (District). The contract provided for annual payments by the District to the City in the amount of $400,000 in return for 20,000 acre-feet of water per year. The contract provided further that, subject to certain exceptions, the District was prohibited from transfer of water received by the city under the contract without consent of the City.

"The District attempted to sell the bulk of its 1983 entitlement to other districts. The City refused consent. The subject water was never used, however; the water eventually ran into the state aqueduct, and

out of the Kern County water basin. The District filed an amended complaint in the U.S. District Court for the Eastern District of California on September 20, 1984, which alleged that: (1) the City's refusal to consent to the transfer violated § 1 of the Sherman Act, 15 U.S.C. § 1; (2) the City was a monopolist in violation of § 2 of the Sherman Act, 15 U.S.C. § 2; (3) the City breached its contract; and (4) the City violated § 17200 of the California Business and Professions Code, which prohibits unfair competition. The District sought $340,000 in damages.

"Pursuant to Fed.R.Civ.P. 56(d), the City moved on December 21, 1984, for a determination of a material issue relating to the retroactive application of the Local Government Antitrust Act of 1984, 15 U.S.C. §§ 34-36 (the LGAA). The City argued that the LGAA, which immunizes local governments from damages liability under the antitrust laws for acts undertaken in an official capacity, should be applied retroactively to it. The district court rejected this argument and denied the motion on March 26, 1985. Thereafter, the City moved for abstention or, in the alternative, summary judgment, and for reconsid-

eration of the order denying retroactive application of the LGAA. The district court denied the motions in an opinion set forth at 634 F.Supp. 656 (E.D. Cal.1986). The district court certified its decision for interlocutory appeal under 28 U.S.C. § 1292(b)." (Appendix B to Petition for Writ of Certiorari, App. 31-32.)

The Ninth Circuit Court of Appeals affirmed the district court's refusal to dismiss or abstain, but reversed the district court's determination that the City of Bakersfield was not entitled to immunity from damages liability under the federal antitrust laws.

REASONS FOR DENYING THE WRIT

Rule 17 of the Supreme Court Rules sets forth the the "special and important reasons" which are considered by this Court in determining whether to grant a petition for writ of certiorari. Petitioner Kern-Tulare Water District ("District") makes a strained effort to characterize this case as one which falls within the scope of Rule 17. However, as Respondent City of Bakersfield ("City") will demonstrate herein, there is no basis for review of this case by the Court.

I.

THE DECISION OF THE NINTH CIRCUIT COURT OF APPEALS IS COMPLETELY CONSISTENT WITH THE DECISIONS OF OTHER FEDERAL COURTS OF APPEAL AND WITH THE DECISIONS OF THIS COURT ON THE ISSUE OF STATE ACTION IMMUNITY FOR MUNICIPALITIES FROM DAMAGES LIABILITY UNDER FEDERAL ANTITRUST LAWS

District does not argue that the decision of the Ninth Circuit in this case is inconsistent with the decision of any other federal court of appeals on the issue of state action immunity for municipalities from damages liability under federal antitrust laws. Nor does District argue that the Ninth Circuit's decision has "so far departed from the accepted and usual course of judicial proceedings, as to call for an exercise

of this Court's power of supervision." (Rule 17.1(a) of the Supreme Court Rules.)

Rather, District appears to take issue with a series of Ninth Circuit decisions on state action immunity, claiming that all of those decisions, including the instant case, are inconsistent with this Court's decisions on this issue.

An analysis of the Ninth Circuit's decision in this case demonstrates that it is completely consistent with the legal principles which were enunciated by this Court in its most recent case on state action immunity, Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985). It is District who seeks to depart from the Town of Hallie decision and inter-

ject factors into the state action immunity test which were never intended by this Court to be part of that test.

In Town of Hallie, this Court made clear that a municipality is entitled to immunity from antitrust damages where its alleged anticompetitive action was taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with regulation in the relevant subject matter area. This Court also made clear that the clearly articulated state policy need not specifically identify or compel the anticompetitive conduct. So long as the conduct is a logical result from a broad authority to regulate granted to a city, the "clearly articulated" state policy test has been met. (471 U.S. at 42.)

In the instant case the only alleged anticompetitive action of the City was its refusal to consent to a resale of water by District, action which was expressly permitted under the terms of the contract by and between the City and the District. In order for such action to fall within the state action immunity under Town of Hallie, there must be, at a minimum, a broad grant of authority to the City to regulate water such that the City's refusal to allow a resale of water would be a foreseeable result of exercising such authority.

The opinion of the Ninth Circuit sets forth the relevant provisions of the California Constitition and the California Water Code and Government Code which authorize the City to regulate and control water resources:

"We begin with the state constitution, which provides that water resources are to be put to beneficial use to the fullest extent of which they are capable, and that waste and unreasonable use are to be prevented. Cal. Const., Art. 10, 2. See also Cal. Water Code § 100 (West 1971). The right to water and it [sic] use is limited to that which is reasonably required, and does not extend to waste or unreasonable use. Cal. Const., Art. 10 § 2. The use of all water is subject to the regulation and control of the state, in a manner to be prescribed by law. Cal. Const. Art. 10 § 5. The constitution

declares further that municipal corporations may establish, purchase and operate public works to furnish their inhabitants with water. Cal. Const. Art 11. § 9(a).

* * *

"It is the 'established policy' of California that a city's right to hold or use water 'to the fullest extent necessary for existing and future uses' should be protected to the fullest extent necessary for existing and future uses, subject to reasonable use and the prohibition against waste. Cal. Water Code § 106.5 (West 1971). Cities enjoy the power

to contract for supplying themselves with water for municipal purposes. Cal. Government Code § 38742 (West 1968). Cities are empowered to acquire water, water rights, and related facilities by purchase or by condemnation, in order to supply water for their use and the use of their inhabitants. Cal. Government Code § 38730 (West 1968). Section 382 provides that cities may sell, lease, exchange or transfer surplus water. It is also state policy to facilitate voluntary transfer of water and water rights where consistent with the public welfare of the place of export and the place of import, Cal. Water Code § 109 (West Supp.

1987); the legislature has found that voluntary water transfers between users can result in more efficient use of water. Cal. Water Code § 475 (West Supp. 1987). Cities are subject to the power of the Water Resources Control Board to take action necessary to prevent such unreasonable use or waste. Cal Water Code § 275 (West Supp.1987)." (Appendix B to Petition for Writ of Certiorari, App. 39-40.)

The constitutional and statutory provisions set forth above go far beyond the grant of authority which this Court found sufficient in Town of Hallie to constitute a clearly articulated and affirmatively expressed state policy to

displace competition with regulation. Further, in light of the fact that municipalities are expressly given the power to sell, lease, exchange or transfer surplus water, it cannot be seriously contended that the City's placing conditions on the sale of water, such as its right to refuse to consent to a resale, is not a foreseeable result of empowering the City with such power.

Indeed, a close reading of District's Petition reveals that it is not making such an unfounded contention. Instead, District has focused on a possible consequence of the City's action, namely, that its refusal to allow a resale resulted in wasting water. Although the alleged noncompetitive action of the City in refusing to

consent to a resale of water is action taken pursuant to a clearly articulated state policy. District contends that the City is not immune from liability because that action allegedly resulted in a violation of another state law or policy prohibiting water waste.

The notion that "thwarting" or "violating" state policy will cause a "loss" of the immunity has surfaced in a number of cases and has often been rejected. In Town of Hallie at footnote 7 of its opinion, this Court cautioned lower federal courts against becoming,

> "embroil[ed] . . in the unnecessary interpretation of state statutes. Besides burdening the courts, it would

undercut the fundamental policy of Parker and the state action doctrine of immunizing state action from federal antitrust scrutiny." (471 U.S. at 44.)

This Court also addressed this issue in another state action immunity case, Hoover v. Ronwin, 466 U.S. 558 (1984), reh. den. 467 U.S. 1268 (1984), wherein plaintiff was an unsuccessful applicant to practice law in Arizona who alleged that the Arizona State Bar had violated the Sherman Act in administering the entrance examinations.

At issue in Hoover was whether the plaintiff could avoid the immunity by suing a private entity, the State Bar, and alleging that the Arizona Supreme Court had abused the state policy

Court had abused the state policy contained in the state constitution by abrogating its duties in favor of that private entity. This Court rejected that argument, explaining that such reasoning:

> ". . . would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the Parker v Brown doctrine."
> (Hoover, at 580.)

A leading case on this issue is Scott v. City of Sioux City, 736 F.2d 1207 (8th Cir. 1984), cert. den. 471 U.S. 1003 (1985), which follows the view of Hoover. Plaintiff in Scott was the developer of a shopping center to be built on the outskirts of town and compete with a center to be built in a downtown redevelopment area. Defendant city rezoned plaintiff's property to prevent its use as a second shopping center, and he brought suit under the Sherman Act, alleging a conspiracy between the developer and the city council aimed at preventing his competing development.

The Court held that the state action immunity applied to the city because the state's urban renewal laws "clearly authorized Sioux City to zone outlying

areas of the city to protect urban renewal goals." (Scott, at 1212), and went on to explain that even if the city had failed to follow the proper procedures in rezoning, there was no antitrust liability unless procedures had been violated in the "extreme". By this the Court meant that unless the City Council had been bribed or had otherwise acted criminally, it was immune, (Id., at 1215); mere "abuses in the administration of jurisdiction conferred by the State should be left for State tribunals to review." [Quoting from Areeda, Antitrust Law, ¶ 212.3(b) at p. 57 (Supp. 1982).]
(Id., at 1216.)

Once the state law has been analyzed and it has been determined that the action of a city was within the

"contemplation" of the State Legislature, a result easily reached here in light of Town of Hallie, then the local agency should not be stripped of its immunity simply because of an allegation that it has violated state law. If District believes the City has violated the state's policy against wasting water, that matter should be taken before the proper state tribunal for review, the California Water Resources Control Board. (California Water Code, Section 275.)

District also argues that there is a state policy which prohibits municipalities from interfering with, or regulating, water districts such as District. This contention is simply a misstatement of the law. Baldwin Park County Water District v. County of Los

Angeles, 208 Cal.App.2d 87 (1962), cited by District, held that where certain county ordinances purporting to impose requirements relative to supplying water were inconsistent with state law, the county ordinances were invalid under the state preemption doctrine. District also relies on City of Santa Clara v. Von Raesfeld, 3 Cal.3d 239 (1970), in which the court, in dictum, stated that a city regulation on a matter of state wide concern cannot conflict with state law under the preemption doctrine. These cases have no application to the instant case. There is no law in California which prohibits the City from contracting for water with the District and from imposing conditions on the resale of that water.

The Town of Hallie decision enunciates a broad state immunity test to be applied to municipalities. The decision of the Ninth Circuit in holding that the City's action is entitled to state action immunity is a proper application of the Town of Hallie case and is consistent with that case and prior decisions of this Court in all respects.

II.

THE OTHER ISSUES RAISED BY DISTRICT ARE IRRELEVANT AND DO NOT PRESENT A BASIS FOR REVIEW BY THIS COURT

District has raised several other issues which are irrelevant to the issue of state action immunity.

First, District raises the old "proprietary" versus "governmental" distinction in City's activities and argues at length as to the iniquities of the City engaging in business - type activities with immunity from liability for anticompetitive conduct to the distress and dismay of private sector businesses. Although it had ample opportunity to do so, this Court did not

include in the state immunity action test the proprietary-governmental distinction which has so long hampered and confused discussion of local government actions. Indeed, this Court has rejected the notion in its entirety. (Garcia v. City of San Antonio Municipal Transit Authority, 469 U.S. 528 (1985), reh. den. 471 U.S. 1049 (1985).) The outdated distinction is, thus, irrelevant to this case and, therefore, is not a proper basis for review by the Court.

In connection with the governmental-proprietary argument, District also makes two other irrelevant claims. First, District claims that the state action immunity attaches only to regulatory activities as opposed to "marketplace" activity. This argument ignores the fact that the City has

specifically implemented its delegated authority under state law by adopting ordinances under its Municipal Code which create a Water Board with the power to, inter alia, enter into agreements to sell water to others on such terms as will best serve the public interest. Second, District contends that the City should not be allowed the benefit of the state action immunity because it would then be given more power than a foreign sovereign nation. The only response that can be made to this nonsensical and irrelevant argument is that it should have been more properly addressed to this Court in 1985, since the Town of Hallie decision gives the City of Eau Claire, Wisconsin more power to control the sale of its sewage services than a foreign nation. It is respectfully submitted that there

is nothing inherently outrageous in permitting an American municipality more economic freedom in delivering its own services than a foreign sovereign.

Finally, District attempts to create an artificial issue by arguing that the state policy pursuant to which the City derives its power to regulate and control water resources does not grant the City authority over rural markets and surplus water. This argument is an attempt to mislead the Court with the use of antitrust buzz words and concepts which have no relevance in the context of this case. Furthermore, District's argument fails in light of the City's express power to sell or transfer "surplus" water to places outside its boundaries.

CONCLUSION

Based upon the foregoing, City respectfully requests that District's petition for writ of certiorari be denied.

Respectfully submitted,

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APPENDIX A
I

CALIFORNIA CONSTITUTION

Article 10, § 2. It is hereby declared that because of the conditions prevailing in this State the general welfare requires that the water resources of the State be put to beneficial use to the fullest extent of which they are capable, and that the waste or unreasonable use or unreasonable method of use of water be prevented, and that the conservation of such waters is to be exercised with a view to the reasonable and beneficial use thereof in the interest of the people and for the public welfare. The right to water or to the use or flow of water in or from any natural stream or water course in this State is and shall be limited to such water as shall be reasonably required for the beneficial use to be served, and such right does not and shall not extend to the waste or unreasonable use or unreasonable method of use or unreasonable method of diversion of water. Riparian rights in a stream or water course attach to, but to no more than so much of the flow thereof as may be required or used consistently with this section, for the purposes for which such lands are, or may be made adaptable, in view of such reasonable and beneficial uses; provided, however, that nothing herein contained shall be construed as depriving any riparian owner of the

reasonable use of water of the stream to which the owner's land is riparian under reasonable methods of diversion and use, or as depriving any appropriator of water to which the appropriator is lawfully entitled. This section shall be self-executing, and the legislature may also enact laws in the furtherance of the policy in this section contained.

Article 10, § 5. The use of all water now appropriated, or that many [sic] hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the State, in the manner to be prescribed by law.

Article 11, § 9(a). A municipal corporation may establish purchase, and operate public works to furnish its inhabitants with light, water, power, heat, transportation, or means of communication. It may furnish those services outside its boundaries, except within another municipal corporation which furnishes the same service and does not consent.

II

CALIFORNIA GOVERNMENT CODE

Section 38730. A city may acquire by gift, purchase, or condemnation, water, water rights, reservoir sites, rights of way for pipes, aqueducts, flumes, or other conduits, and all other property and appliances suitable and proper to supply water for the use of the city and its inhabitants.

Section 38742. The legislative body of any city may:

(a) Contract for supplying the city with water for municipal purposes.

(b) Acquire, construct, repair, and manage pumps, aqueducts, reservoirs, or other works necessary or proper for supplying water for the use of the city or its inhabitants or for irrigating purposes in the city.

(c) Use any portion of the revenues from any water works or water supply or distribution facilities, including but not limited to water works or water supply or distribution facilities acquired or constructed with funds from bonds issued under an act entitled "An act to provide for the formation of districts within municipalities for the acquisition or construction of public improvements, works and public utilities; for the issuance, sale and payment of bonds of

such districts to meet the cost of such improvements; and for the acquisition or construction of such improvements," approved April 20, 1915, the Municipal Improvement District Act of 1927, an act entitled "An act to provide for the formation of districts within municipalities for the acquisition, construction or extension of water works, water systems or water distribution systems; for the issuance, sale and payment of bonds of such districts to meet the cost of such water works, water systems or water distribution systems; and for the acquisition, construction or extension of such water works, water systems or water distribution systems" approved April 26, 1935, or from general obligation bonds of the city, for the payment of principal and interest of any such bonds or any other bonds authorized by vote of electors and issued to acquire or construct any water works or water supply or distribution facilities within the city.

(d) Enter into agreements with, and accept financial or other assistance from, the United States or a federal department or agency, for the acquisition, construction, maintenance, and operation of the city water system and the sale and distribution of water from the system.

III

CALIFORNIA WATER CODE

Section 275. The department and board shall take all appropriate proceedings or actions before executive, legislative, or judicial agencies to prevent waste, unreasonable use, unreasonable method of use, or unreasonable method of diversion of water in this state.

PROOF OF SERVICE

I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California.

I declare under penalty of prejury under the laws of the State of California that the foregoing is true and correct.

I declare that I am employed in the office of a member of the bar of this Court at whose direction service was made.

Executed on March 29, 1988 at Los Angeles, California.

Barbara Baxter

SUPREME COURT OF THE UNITED STATES

KERN TULARE WATER DISTRICT *v.* CITY OF BAKERSFIELD, CALIFORNIA

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 87-1433. Decided May 16, 1988

The petition for a writ of certiorari is denied.

JUSTICE WHITE, dissenting.

This Court has previously held that a municipality is immune from antitrust liability under the state action exemption if it can demonstrate that "it is engaging in the challenged activity pursuant to a clearly expressed state policy." *Hallie* v. *Eau Claire*, 471 U. S. 34, 40 (1985); see *Parker* v. *Brown*, 317 U. S. 341 (1943). It is not necessary that the legislature explicitly state that it intends municipalities to engage in anticompetitive conduct pursuant to the state policy; it is enough that "anticompetitive effects logically would result from [the] broad authority to regulate." *Hallie*, *supra*, at 42. From these principles, I had thought it clear that an antitrust violation would be established by showing that a municipality restrained trade by acting contrary to the clearly articulated state policy. Yet the Ninth Circuit has held here that ordinary "abuses" by local authorities in the field generally covered by the state policy are matters for state tribunals and not concerns of federal antitrust policy. 828 F. 2d 514, 522 (1987).

The mischief of this unwarranted expansion of the state action exemption can be seen in the facts of this case. All agree that an integral part of California's state water policy is its prohibition against waste and unreasonable uses of water. 828 F. 2d, at 519 (citing Cal Const., Art. 10, § 2; Cal. Water Code Ann. § 106.5 (West 1971)). Furthermore, the state policy expressly encourages municipalities to transfer water rights so as to improve the efficiency of water use. Cal. Water Code Ann. § 109 (West Supp. 1987). Here, petitioner

water district alleged that respondent city controlled sources of water exceeding its annual needs, was in the business of reselling the surplus water for rural irrigation, and had entered a 35-year contract with petitioner, providing that petitioner would pay respondent $400,000 per year for 20,000 acre-feet of water per year. The water district alleged that, contrary to past years under the contract, the city refused to allow the district to transfer excess water to third parties, who evidenced their need for it by their willingness to pay. The city sent a letter explaining its stance as necessary to effectuate the contractual provision requiring that the water be used only by the district. Because the city refused to allow the district to transfer the water to third parties and because the district did not need the water, it eventually ran into the state aqueduct, either to be wasted as run-off into the sea or to flow to communities outside of the Kern County water basin. Whatever the fate of the dumped water, petitioner alleges that the city prevented the transfer to maintain its control of the resale market for irrigation water in Kern County.

The irony of the Ninth Circuit's decision is its bestowing of antitrust immunity for such conduct based on a state statutory scheme, which is intended to promote efficient use of water and prevent its waste. It seems questionable that the contractual prohibition of transfer rights, possibly resulting in the waste of the water and certainly preventing an efficient transfer, was the kind of action that the California legislature contemplated when it enacted the statutory scheme *Hallie*, *supra*, at 44. Municipal actions that contravene express limits in the state policy would not seem to be taken pursuant to a clearly articulated policy and thus would not seem to be shielded by the state action exemption. The Ninth Circuit's characterization of the alleged violation of state policy as an ordinary error or occasional abuse seems insufficient to insulate the municipality from liability for action that restrains competition. There seems little room in the Sherman Act's prohibition of restraint of trade for such a

forgiving rule. Because I do not believe that every municipality deserves one free anticompetitive bite, I would grant certiorari.